

Former Employees

Legal, Practical and Ethical Issues

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I. Former Employees: Legal, Practical, and Ethical Issues Relating to Former Employees

In litigation, a former employee may be your worst enemy, your best friend or anything in between. One certainty is that every defense practitioner will inevitably face issues related to former employees. A young associate may be asked to interview a former employee during a fact investigation. An in-house attorney may be asked to analyze the exit strategy for an employee. In litigation, discovery may be propounded asking for depositions of, or materials held by, former employees. These situations are fraught with ethical and professional considerations that a defense practitioner must consider at every juncture.

This paper provides an overview of the major areas in which a defense practitioner may need to address issues related to former employees. In addition, this paper addresses some of the practical, legal, and ethical concerns that may arise in such situations.

A. Communications with a Client's Former Employees

1. The Attorney-Client Privilege

When you are asked to interview your client's former employee, or prepare a former employee for a deposition or trial, the question arises as to whether or not those discussions are privileged. Most courts have held that communications between former employees and a corporation's counsel are usually privileged, regardless of whether those communications occurred during or after the employee's period of employment. Special attention must be paid, however, to the content of the communications, as that content will determine the communications' privileged status.

a. The general rule

In 1981, the Supreme Court decided *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which they adopted the "subject matter test" to determine whether discussions between current employees and a corporation's counsel are privileged. Under this test, the privilege hinges on the subject matter of the communications, rather than the person with whom the corporation's counsel communicated as designated by the "control group test." Under the subject matter test, communications are privileged if they: 1) were made to the corporation's counsel, acting as such; 2) were made at the direction of corporate superiors, for the purpose of securing legal advice from counsel; 3) concerned matters within the scope of the employees' corporate duties and 4) the employees were sufficiently aware that they were being questioned so the corporation could obtain legal advice. *Id.* at 394–95. The court declined to answer; however, the question of whether communications between a corporation's attorneys and former employees were protected by the attorney-client privilege. *Id.* at 395 n.3.

The only guidance offered by the *Upjohn* Court was Justice Burger's concurring opinion where he stated that when a former employee speaks with an attorney at the direction of the corporation's management, the former employee's communications remain privileged. *Id.* at 402–03 (J. Burger, concurring). Since then, the vast majority of courts have adopted and clarified Justice Burger's position, holding that a former employee's communications with a corporation's counsel are protected by the privilege, if the communications 1) concerned matters within the employee's scope of employment and 2) were made during the time of employment.

See, e.g., *Surles v. Air France*, 00 Civ. 5004 (RMB) (FM), 2001 U.S. Dist. LEXIS 10048, at * 17 (S.D.N.Y. July 19, 2001) (noting the majority rule); see also *Better Gov't Bureau, Inc. v. McGraw*, 106 F.3d 582, 606 (4th Cir. 1997); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 40 (D. Conn. 1999); *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D. Mass. 1987); *Porter v. Arco Metals, Div. of Atlantic Richfield*, 642 F. Supp. 1116, 1117–18 (D. Mont. 1986).

b. Communications with employees after they have left the corporation

Courts clearly hold that employee-counsel communications that occur *during* employment remain privileged after the employment relationship is severed. See, e.g., *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (“[P]rivileged communications which occur during the period of employment do not lose their protection when the employee leaves the client corporation.”). However, the issue of communications that occur *after* the employee has left the corporation has not been afforded much treatment.

In *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999), the court clarified *Upjohn* and set forth the general rule regarding subsequent communications. Specifically, the court determined that communications made after the employment relationship is severed that are made for the purpose of learning facts that the employee “was aware as a result of her employment,” are privileged. *Id.* However, any such communications that go beyond the “underlying facts of [the] case,” are not privileged. *Id.* The court provided examples of non-privileged subsequent communications: a corporation’s counsel informing the former employee of other witnesses’ testimony; discussing how to answer questions during a deposition; and, and facts developed during the litigation of which the former employee did not have independent knowledge. *Id.*

The *Peralta* court also attempted to provide a rule regarding subsequent communications:

The distinction drawn by the Court between attorney-client privileged and non-privileged communications with former employees should not be difficult to apply if the essential point is kept in mind: 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. at 41–42. This rule has been followed by at least one court. See *United States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C.*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004) (“[T]he line to be drawn is not difficult: if the communication sought to be elicited relates to [the former employee’s] conduct or knowledge during her employment with [defendant], or if it concerns conversations with a corporate counsel that occurred during her employment, the communication is privileged; if not, the attorney-client privilege does not apply.”).

Although most courts have not provided this clear a rule, a number of other courts seem to agree with the *Peralta* Court’s analysis. For instance, in *Better Gov’t Bureau, Inc. v. McGraw*, 106 F.3d 582 (4th Cir. 1997), the fourth circuit held that a corporation’s counsel need not answer questions concerning a post-employment interview with a former employee where the interview was conducted “at the direction of [the] client, in order to provide legal advice to [the] client.” *Id.* at 606; see also *Surles v. Air France*, No. 00 Civ. 5004 (RMB) (FM), 2001 U.S. Dist. LEXIS 10048, at * 17 (S.D.N.Y. July 19, 2001) (holding that both during-employment and subsequent former-employee-to-corporate-counsel communications are privileged “if they are focused on exploring what the former employee knows as a result of his prior employment about the circumstances giving rise to the lawsuit”); *Wade Williams Distrib. v. ABC*, No. 00 Civ. 5002 (LMM), 2004 U.S. Dist. LEXIS 12152, at *4–5 (S.D.N.Y.

June 30, 2004) (holding that a corporation's counsel's assertion that she represented a former employee was not enough to protect subsequent communications outside the scope of the conduct and knowledge gained during the former employee's employment). But see *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000) (extending the privilege to former employees, but limiting it to communications which themselves were privileged and which occurred during the employment relationship).

In sum, although in *Upjohn* the Supreme Court refused to answer the question of privilege as applied to former employees, courts have uniformly applied *Upjohn's* reasoning to all employees. The key question for those courts is not *timing* of the communications, but their *content*. Most courts appear to agree that even if the communication occurs after the employee leaves the corporation's employ, the privilege still attaches *if* the communications encompass information learned during employment.

c. When is a matter “within the scope of the employees’ corporate duties”?

Whether or not a former employee, or any employee, acted within the scope of his corporate duties is an issue usually addressed when determining whether a master may be held liable for the acts of his servant employee. See, e.g., Restatement (2d) of Agency §228 (“Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master. . .”). In other situations, statutes may determine what falls within “corporate duties.” For example, the Federal Tort Claims Act requires the Attorney General to determine whether or not the actions taken by an employee are within the scope of his employment for purposes of substituting the United States as the proper defendant. See 28 U.S.C.S. §2679(d).

However, in the majority of situations involving the attorney-client privilege, guidance is less clear. The determination as to what constitutes an employee's “corporate duties” is almost always fact-specific and courts usually provide little analysis regarding whether or not a communication concerned a matter within the scope of an employee's corporate duties. See *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1493 (9th Cir. 1989) (holding communications were within corporate duties where they “related directly” to the employee's role in the litigation); *Baxter Travenol Lab. v. Le May*, 708 F.2d 721 (6th Cir. 1982) (holding communications “which concerns matters that occurred prior to the employee's employment with the corporation” are obviously not within the employee's corporate duties); *Diversified Indus. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (negating the privilege as to communications the employee had “merely as a fortuitous witness” and citing a test similar to that eventually adopted by *Upjohn*); *Donnell v. Comdisco, Inc.*, No. 95-C-512, 1995 U.S. Dist. LEXIS 13214, at *6 (N.D. Ill. Sept. 12, 1995) (holding that questioning by a corporation's counsel regarding the employee's dating relationships were not covered by the corporation's privilege); *Nakajima v. General Motors Corp.*, 857 F. Supp. 100, 104 (D.D.C. 1994) (holding that “corporate duties” do not include investigations performed for the corporation after the employee has left the company); *Cohen v. McDonnell Douglas Corp.*, No. 4:92CV1048 GFG (CDP), 1993 U.S. Dist. LEXIS 21021, at *3-5 (E.D. Mo. July 12, 1993) (stating that communications regarding a document retention and production were privileged where the documents were produced at the request of in-house counsel). The only guidance provided by courts is to exclude clearly non-employment related issues such as dating relationships and pre-employment communications. Otherwise, the determination of what constitutes an employee's “corporate duties” is singularly fact-based and does not lend itself to a pre-determined test.

d. Illinois courts use the control group test

Illinois is the only state to refuse to apply *Upjohn* to the question of the corporate privilege, thus it becomes important for the practitioner to pay attention to the former employee's *position* in the corporation. *Barrett Industrial Trucks v. Old Republic Ins. Co.*, 129 F.R.D. 515, 517-18 (N.D. Ill. 1990). In *Barrett*, the court

refused to apply *Upjohn's* subject matter test because Illinois law applied the “control group test” to determine whether or not a privilege existed. The court recognized the oddity of its holding, and noted that most states “did not seek to confine the privilege within the same narrow limits required by the Illinois courts.” *Id.* at 518 n.2. Illinois remains an outlier in their application of the control group test, and the reasoning of *Upjohn* and *Peralta* controls in the majority of jurisdictions. See *Dexia Credit Local v. Peter Rogan*, 231 F.R.D. 287 (N.D. Ill. 2005) (applying Illinois law); *Sterling Fin. Mgmt., L.P. v. UBS Painewebber*, 782 N.E.2d 895, 900 (Ill. App. Ct. 2002) (recently reaffirming Illinois’ application of the control group test); see also *Clark Equip. Co. v. Lift Parts Mfg. Co.*, No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457, at *14 (N.D. Ill. Oct. 1, 1985) (specifically noting that post-employment communications with former employees are not within the scope of the attorney-client privilege). Illinois’ use of the control group test is noteworthy because any communications in Illinois with former employees will depend on their prior stature within the corporation, not the subject matter of the communications.

e. Can the former employee claim the privilege?

What would happen in the situation where the corporation does not claim communications between its counsel and a former employee are privileged, but the former employee claims the privilege? The Supreme Court answered that question in *Commodity Futures Trading Com. v. Weintraub*, 471 U.S. 343 (1985). In *Weintraub*, the court held that current employees decide whether to assert the privilege on behalf of the corporation. *Id.* at 349. Former employees; however, cannot claim the privilege where current employees desire them to speak:

The parties also agree that when control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.

Id. Thus, where there the corporation’s current employees do not claim a privilege the former employee cannot assert a privilege and keep silent. This point may be particularly important where a corporation is being sued because of a former employee’s actions. If a former employee had discussions with a corporation’s counsel about some mishap or wrongdoing prior to the employee leaving the corporation, those communications would be subject to the privilege—the corporation’s privilege. Thus, if the corporation desires the former employee to speak, the former employee cannot refuse to do so.

f. Choice of law and the attorney-client privilege

A choice of law issue may arise where communications with a former employee occur in a state other than the forum in which litigation is taking place. For example, an employee might leave a corporation located in Boston and retire in Miami, but the underlying litigation is occurring in Houston. Does the law of Massachusetts, Florida, or Texas apply to the communications held during employment? What about the communications that occurred after the employee moved to Florida? The Restatement (2d) of Conflict of Laws §139 provides an exacting application of choice of law rules when it comes to privileged communications. Section 139 reads:

(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

[Emphasis added]. Among the factors that the forum court should consider in determining which state has the “most significant relationship” with the communications: 1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, 2) the relative materiality of the evidence that is sought to be excluded, 3) the kind of privilege involved and 4) fairness to the parties. *Id.* at cmt. d. Comment (e) to Section 139 explains that the “state with the most significant relationship will *usually be the state where the communication took place*, which as used in the rule of this Section, is the state where an oral interchange between persons occurred, where a written statement was received, or where an inspection was made of a person or thing.” [Emphasis added].

The court in *Anas v. Blecker*, 141 F.R.D. 530, 533 (M.D. Fla. 1992) provides a clear example of how the “most significant relationship” test is applied in practice. A defendant real estate appraiser filed a motion for protective order to prevent the plaintiff investors from deposing a representative of a non-party peer review institute in Illinois. The institute had brought disciplinary action against the defendant appraiser. The defendant cited the Illinois peer-review privilege in support of his protective order. The plaintiffs argued that the Florida privilege should apply. Applying Section 139, the Florida court held that the Illinois privilege applied because the entirety of the communications regarding the defendant’s disciplinary proceedings took place in Illinois, and thus Illinois had the most significant relationship with the privilege at issue. *Id.* at 532.

The same analysis under the Restatement would likely apply to the situation described above. The communications that took place in Boston prior to the employee’s departure from the corporation would be analyzed under the law of Massachusetts. Any communications that occurred in Miami, after the employee’s retirement would be analyzed under Florida law because the court is likely to apply the law of the state in which the communications took place. Thus, a corporation’s attorneys should keep in mind that if they travel to another state to interview a former employee, but wish to keep those communications privileged, the law of the state in which the interview takes place will likely apply to the questions of privilege as to those conversations.

2. The Work-Product Doctrine

The work-product doctrine is closely associated with the attorney-client privilege. Although the doctrine has received limited application to former employees, the rule is relatively clear. Federal Rule of Civil Procedure 26(b)(3) sets out the work-product doctrine:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Although the rule only explicitly addresses documents and other tangible items, communications with former employees may also be protected by the work-product doctrine because they would reveal the mental

impressions, conclusions, or opinions of an attorney. *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 42 (D. Conn. 1999); *Hydramar, Inc. v. General Dynamics Corp.*, 119 F.R.D. 367, 372 (E.D. Pa. 1988).

Thus, the work-product doctrine acts to limit deposition questioning of former employees where such questioning seeks to discover an attorney's mental impressions, conclusions, or opinions. *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999) (“[C]ounsel will therefore be precluded from asking [the former employee] explicitly about [the corporation's counsel's] legal conclusions or legal opinions that reveal the defendant's legal strategy.”); *Hydramar, Inc. v. General Dynamics Corp.*, 119 F.R.D. 367, 372 (E.D. Pa. 1988) (“The work product doctrine does in a very limited way operate to circumscribe the scope of depositions upon oral examination.”). The distinction between current and former employees is irrelevant because the work-doctrine protects all attorneys' mental impressions from discussion during a deposition, no matter who is the deponent. Attorney work-product is protected, no matter the subject matter.

3. Instructions Regarding Contact by an Adverse Party

In interviewing a client's former employee, the question often arises as to whether the attorney can advise the former employee on how to respond if an adverse party in the litigation contacts them.

ABA Model Rule of Professional Conduct 3.4(f), entitled “Fairness to Opposing Party and Counsel” provides:

A lawyer shall not: . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. the person is a relative or an employee or other agent of a client; and
2. the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Model Rules of Professional Conduct, Rule 3.4(f). The comment to Rule 3.4 states: “Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client.” Thus, with respect to current employees of a client, an attorney may clearly advise an employee not to communicate with another party in the litigation.

Although there is little case law discussing whether or not this rule applies equally to former employees, at least one court has interpreted Rule 3.4(f) to mean that an attorney cannot advise a client's former employees not to provide information to another party. See *Porter v. Arco Metals Co., Div. of Atlantic Richfield Corp.*, 642 F. Supp. 1116, 1118 n.3 (D. Mont. 1986) (noting that “Rule 3.4(f) [] allows an attorney to advise employees of a client to refrain from voluntarily giving information to another party. [The corporation] may so advise its present employees, but has no such authority over former employees.”). However, in *Upjohn Co. v. Aetna Casualty & Sur. Co.*, 768 F. Supp. 1186, 1216–17 (W.D. Mich. 1991), the court determined that a letter from the corporation's counsel to former employees that,

[I]nforms the former employee that it is being sent pursuant to a federal court order to enable him/her to make an informed decision whether to consent to an interview . . . identifies the interviewer as an investigator hired by insurers who are defendants in a lawsuit brought by the former employer, the matter about which the interview would concern, and the purpose of the interview [and] reiterates that the former employee has the freedom to refuse to be interviewed”

did not violate Rule 3.4(f) because the “letter is a clear statement defining the reader's options and does not constitute an inducement not to voluntarily provide information.” *Id.*

B. Interviewing an Adverse Party's Former Employees

Former employees may hold a wealth of knowledge regarding their former employer or the subject matter of the litigation. *Ex parte* interviews would provide the employer's opponent in litigation with a less expensive means of discovery than depositions, and may lead to the opponent's development of theories unbeknownst to the employer. On the other hand, *ex parte* contacts with corporate employees pose a threat to the attorney-client privilege because the former employee may not know about the privilege and may not share the employer's interest in preserving the privilege. Thus, although *ex parte* interviews are generally allowed, an opposing attorney must take care not to tread into the interviewee's knowledge gained from privilege communications during her employment.

1. Ethics Rule

ABA Model Rule of Professional Conduct 4.2 entitled "Communication with Person Represented by Counsel," provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

Model Rules of Professional Conduct, Rule 4.2.¹ The official comment to the rule states that it prohibits:

[C]ommunications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with [the] matter may be imputed to the organization...or whose statement may constitute an admission on the part of an organization.

Comment to Rule 4.2.

In addition, the 2002 Amendments to Rule 4.2 revised Comment [7] to provide that "consent of the organization's lawyer is not required for communication with a former constituent." Comment [7] to Rule 4.2. The Reporter's Observations noted that this sentence was added to "clarify" that consent of the organization's counsel is not necessary to communicate with former employees. The Comments add that, "in communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization." Since 2002, a number of jurisdictions have adopted or proposed changes to their rules and/or comments that are identical or substantially similar to Comment [7]. *See, e.g.*, N.C. R. Prof. Conduct 4.2, Comment [9] ("Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule. Compare Rule 3.4(f)."); Tennessee R. Prof. Conduct, Comment [4] ("Consent of the organization's lawyer is not required for communication with a former agent or employee.... In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization."). *See also United States v. W.R. Grace*, 401 F. Supp. 2d 1605 (D. Mont. 2005) (holding that the ABA's changes to its Model Rule 4.2 by incorporation changed the District Court's local ethics rules).

2. No Contact with Former Employees

The interpretation of Rule 4.2 and its predecessor, DR 7-104(A)(1), as it applies to *ex parte* interviews with former employees, has been vigorously litigated. A small minority of courts has held that Rule 4.2 bars *any ex parte* communications with former employees. See *Public Serv. Elec. & Gas Co. v. Associated Elev. & Gas Ins. Servs., Ltd.*, 745 F. Supp. 1037, 1039 (D.N.J. 1990); see *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651, 657–58 (M.D. Fla. 1992), *aff'd.*, 43 F.3d 1439 (11th Cir. 1995) (holding that Rule 4.2 barred contact with opposing party's former employee who was privy to confidential and proprietary information). But see *Klier v. Sordoni Skanska Constr. Co.*, 722 A.2d 761, 769 (N.J. Super. Ct. 2001) (rejecting *Public Serv. Elec. & Gas Co.* interpretation of Rule 4.2 because it was determined before New Jersey's amendments to the Rules of Professional Conduct). Notably, these decisions occurred before the 2002 Amendments to the Model Rules of Professional Conduct.

3. Permitting Contact with Former Employees

Even before the 2002 Amendments to the Model Rules, numerous courts held that because Rule 4.2 does not apply to former employees, an adverse party might contact any former employee. See, e.g., *Wright by Wright v. Group Health Hosp.*, 691 P.2d 564, 569–70 (Wash. 1984) (holding that because former employees do not speak for the corporation, they are not within the scope of Rule 4.2); *State Ex Rel. Charleston Area Med. Ctr. v. Zakaib*, 437 S.E.2d 759, 764–65 (W. Va. 1993) (holding that Rule 4.2 is inapplicable to former employees because their ability to bind the corporation is restricted).

In 1991, the Standing Committee on Ethics and Professional Responsibility of the ABA also opined that Rule 4.2 does not apply to former employees. ABA Formal Opinion 91–359 (Mar. 22, 1991). The Committee, while recognizing that persuasive policy arguments can, and have been made for extending Rule 4.2 to at least some former corporate employees, stated that: “[T]he fact remains that the text of [Rule 4.2] does not do so and the comment gives no basis for concluding that such coverage was intended.” The Committee noted that restricting communications with former employees would “inhibit the acquisition of information.” However, the Committee also cautioned that counsel who spoke with a former employee should be careful not to induce the former employee to divulge any information that might violate the corporation's attorney-client privilege.

The Committee's interpretation of Rule 4.2 has been adopted by a number of courts. See, e.g., *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723, 728 (N.D. Ill. 1996); *Brown v. St. Joseph County*, 148 F.R.D. 246 (N.D. Ind. 1993); *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259 (S.D. Iowa), *aff'd.*, 49 F.3d 466 (8th Cir. 1995); *Aiken v. Business & Industry Health Group, Inc.*, 885 F. Supp. 1474, 1477 (D. Kan. 1995); *Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 902–04 (E.D. Pa. 1991); *Shearson Lehman Bros., Inc. v. Wasatch Bank*, 139 F.R.D. 412 (D. Utah 1991); *Reynoso v. Greynolds Park Manor, Inc.*, 659 So. 2d 1156 (Fla. Dist. Ct. App. 1995).

Similarly, a number of ethics opinions have held that former employees are not within the scope of Rule 4.2 and thus, *ex parte* communications are permitted. See, e.g., Alabama Ethics Opinion 1993–05 (3/31/93); District of Columbia Bar Legal Ethics Comm., Opinion 287 (1/19/99); Utah State Bar Ethics Opinion No. 04–04 (8/25/04); Colorado Ethics Opinion 69 (6/20/87; addendum added 1995); Florida Bar Professional Ethics Committee, Opinion 88–14 (3/7/89); Opinion No. FIO 215 of the Mississippi Bar (3/4/94); North Dakota Ethics Committee Opinion 92–13 (10/15/92).²

4. Middle Ground Approach to Contact with Former Employees

Some courts have taken an intermediate view and permitted *ex parte* contact with some former employees, or only with conditions. See, e.g., *Patriarca v. Ctr. for Living & Working, Inc.*, 778 N.E.2d 877 (Mass. 2002) (declining to determine the general applicability of Rule 4.2 to former employees because the former

employees in question would not be covered by the rule even if they were still employed by the corporation). For example, in *Spencer v. Steinman*, 179 F.R.D. 484 (E.D. Pa. 1998), the court stated its middle-ground for the application of Rule 4.2 to former employees as:

[An] assessment [that] would depend upon weighing such factors as the positions of the former employees in relation to the issues in the suit; whether they were privy to communications between the former employer and its counsel concerning the subject matter of the litigation, or otherwise; the nature of the inquiry by opposing counsel; and how much time had elapsed between the end of the employment relationship and the questioning by opposing counsel.

Id. at 491 [citations omitted]. In addition, some courts have permitted *ex parte* interviews of former employees unless the person's acts or omissions may be imputed to the corporation or the former employee has an ongoing agency or fiduciary relationship with the corporation. See, e.g., *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 40–41 (D. Mass. 1987); *Valassis v. Samelson*, 143 F.R.D. 118, 122–24 (E.D. Mich. 1992); *Lang v. Super Ct.*, 826 P.2d 1228, 1233 (Ariz. Ct. App. 1992); see also *Bobele v. Super Ct.*, 245 Cal. Rptr. 144, 147 (Cal. Ct. App. 1988) (holding that the prohibition against *ex parte* contact with a former employee under Rule 4.2 does not extend to those who were not members of the “control group”). Other courts have added that *ex parte* communications are prohibited where the former employee's statements could act as an admission of the corporation. See *Browning v. AT&T Paradyne*, 838 F. Supp. 1564 (M.D. Fla. 1993) (noting that “a ‘party’ for purposes of [Rule 4.2] includes former managerial employees, if their statements ‘... could be admissions against the corporation or... their actions could be imputed to the corporation.’”) [citations omitted]. Some courts hold that *ex parte* communications are permitted unless the former employee has potential confidential, classified, or privileged information that could be disclosed. See *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827, 830 (N.D. Ind. 2002).

Similarly, in *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997), the court held that it was proper to disqualify an attorney for *ex parte* contacts with a former employee (attorney) who had been exposed to confidential information during the course of his representation with other interested parties because the disqualified attorney knew or should have known of the former employee's exposure to such information. However, in *Davidson Supply Co., Inc. v. P.P.E., Inc.*, 986 F. Supp. 956 (D. Md. 1997), the District of Maryland held that *ex parte* contact was permissible in relation to a former employee whose access to trade secrets and confidential information was not related to the claims in the current litigation. *Id.* at 958–59.

5. Limits on Contact with Former Employees

Even in jurisdictions permitting contact with former employees—because such contacts are not subject to Rule 4.2—former employees are “barred from discussing privileged information to which they are privy.” *Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004) (quoting *In re Bank of La./ Kenwin Shops Inc., Contract Litig.*, No. Civ. A. 97 MDL No. 1193, 1998 U.S. Dist. LEXIS 17812, at *3 (E.D. La. Nov. 10, 1998); *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723, 728 (N.D. III. 1996)). In addition, attorneys “have a responsibility to refrain from inquiring into areas that may be subject to the attorney-client privilege or the work product doctrine. *Kalamazoo Ophthalmology*, 322 F. Supp. 2d at 890–91. Therefore, an attorney may have *ex parte* contact with an unrepresented former employee of an organizational party, subject to the limitation that the attorney may not inquire into areas subject to the attorney-client privilege or work product doctrine. *Id.* at 891; see also *Palmer v. Pioneer Hotel & Casino*, 19 F. Supp. 2d 1157, 1167 (D. Nev. 1998); *Breedlove v. Tele-Trip Co.*, No. 91 C 5702, 1992 U.S. Dist. LEXIS 12149, at *2 (N.D. III. Aug. 14, 1992).

In *Kalamazoo*, the court provided a road map for how to conduct *ex parte* interviews with former employees without risking such sanctions or potential disqualification. Specifically, the court stated that to

avoid any alleged impropriety, the attorney who interviewed the former employee should have notified the former employer's counsel to allow the counsel to obtain a protective order limiting the scope of the interview. *Kalamazoo Ophthalmology*, 322 F. Supp. 2d at 891–92.

6. Hiring an Adverse Party's Former Employee

A number of jurisdictions continue to apply the Canons of Professional Responsibility ("CPR"). Under Canon 9, an attorney is required to avoid the appearance of impropriety. The tenth circuit held that an attorney, who hired an adverse party's former employee to assist in reviewing and organizing documents, violated Canon 9. *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163 (10th Cir. 2003). In *Butler*, the district court determined that the former employee, who was a former administrative assistant for a number of high-ranking corporate officers, "possessed substantial confidential information about [the corporation] that she agreed to keep confidential." *Id.* at 1170. "The district court... held that the 'appearance of impropriety' is raised when an attorney hires an ex-employee of an adversary who had been exposed to substantial amount of confidential information to assist in litigation, even when the attorney takes precautions to prevent the disclosure of confidential information." *Id.* Thus, the attorney violated Canon 9. *Id.* The tenth circuit held that the district court did not abuse its discretion. *Id.* at 1172; see also *In re Data Gen. Corp. Antitrust Litig.*, MDL No. 369 (N.D. Cal. 1986) (noting that while defendant could obtain testimony of plaintiff's former employees through discovery, defendant could not hire the former employees as paid consultants because they had become privy to matters protected by privilege or confidentiality).

C. Payment of Former Employees

During litigation, it is often former employees who were present when the product was being developed, when it was first manufactured, when the plaintiff was allegedly injured, or when the product was removed from the market. In fact, sometimes, a former employee may be the client's most knowledgeable witness. However, a former employee will likely be reluctant to donate vast amounts of time to preparing for deposition or preparing for trial. The issue therefore arises as to whether or not the client can or should compensate former employees for their involvement in litigation.

1. General Rules

In general, when a party to litigation calls a witness because of that witness' vast personal knowledge of the subject matter of a lawsuit, "public policy dictates that such a witness may not be compensated for his services" even if the witness has a close connection with the lawsuit. *Goldstein v. Exxon Research & Eng'g Co.*, Civ. No. 95-2410, 1997 U.S. Dist. LEXIS 14600, at *11 (D.N.J. Feb. 28, 1997). However, courts recognize the following exceptions: 1) expenses reasonably incurred by a witness in attending or testifying; 2) reasonable compensation to a witness for his loss of time attending or testifying and 3) reasonable fee for the professional services of an expert witness. *Id.* at *3–4.

Rule 3.4(b) of the ABA Rules of Professional Responsibility prohibits a lawyer from "offer[ing] an inducement to a witness that is prohibited by law." Comment 3 explains:

It is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Interpreting Rule 3.4(b), the American Bar Association's Standing Committee on Ethics and Professional Responsibility has stated that

[a]s long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party, the Committee is of the view that such payments do not violate the Model Rules.

ABA Comm. on Ethics & Professional Responsibility, Formal Op. 96-402 (1996). Thus, the ABA Ethics Committee Opinion concluded that as long as the amount of compensation is reasonable and not barred by local law, the witness can be ethically compensated for the time spent: 1) attending a deposition or trial; 2) attending pretrial interviews with attorneys in preparation for testifying and 3) reviewing and researching records germane to the testimony. *Id.*

This ABA Opinion raises the question as to what compensation is "reasonable." The Opinion provides some guidance in this regard:

[T]he amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony. What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work—as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony—as, for example, where the witness is retired or unemployed—the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances. Once that determination has been made, nothing in the Model Rules prohibits a lawyer from making payments to an occurrence witness as discussed herein.

Id.

In addition to the ABA Opinion, there is wide support for the proposition that a witness, such as a former employee, may be paid for lost time. *See, e.g.*, 18 U.S.C. §201 (allowing payments to witnesses "for the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing or proceeding"). However, the support for whether or not a witness should be compensated for preparation time is not as uniform among jurisdictions. *Compare* Cal. Ethics Op. 1997-149 (allowing an attorney to pay a non-expert witness for time spent preparing for a deposition or trial as long as such compensation is reasonable); Colorado Ethics Op. 103, 12/19/98 (an attorney may ethically reimburse a non-expert witness the "reasonable value of the witness's time expended in testifying and in preparing to testify"); Ariz. Ethics Op. 97-07 ("a reasonable fee may be paid to a fact witness for time spent preparing for testimony"); Ky. Adv. Ethics Op. KBA E-400 (concluding that an attorney may "compensate a witness for reasonable out-of-pocket expenses and reasonable lost income . . . while engaging in necessary preparation with the attorney") and Pennsylvania Bar Assoc. Comm. On Legal Ethics & Prof. Responsibility Op. 95-126 (expressing disfavor for compensating a non-expert witness for time spent preparing to testify).

2. Agreements to Pay a Former Employee

In considering payments to former employees who are witnesses in the litigation, a client may seek to enter into some kind of agreement with the former employee, such as a consulting agreement or general retainer agreement. In general, the majority of jurisdictions permit such agreements as long as the agreement is only to compensate the former employee for his or her time and expenses in assisting in the litigation. *See, e.g., Centennial Mgmt. Servs. Inc. v. Axa Re Vie*, 193 F.R.D. 671 (D. Kan. 2000) (holding that consulting agreement, which called for an upfront payment of \$20,000 to cover the former employee's prior work and paid him

\$125 to \$200 per hour for additional time, was justified considering the former employee's years of experience, first-hand experience of the subject matter of the lawsuit, and the complex nature of the lawsuit, and there was no evidence that payment to the former employee was "for" or "because of" his trial testimony); *cf. State v. Solvent Chem. Co.*, 166 F.R.D. 284, 290 (W.D.N.Y. 1996) (holding that payment to former vice president for assisting in litigation, coupled with the corporation's agreement not to file a lawsuit against the vice president and to indemnify him in the current litigation, was improper because "providing the [former vice president] with protection from liability . . . went too far."); *Golden Door Jewelry Creations, Inc. v. Lloyd's Underwriters Non-Marine Ass'n.*, 865 F. Supp. 1516 (S.D. Fla. 1994) (sanctioning defendant for payments of \$493,000 and \$147,000 to two witnesses whereby the payments included rewards for coming forward with information, \$95,000 and \$25,000, respectively for fees for deposition testimony, and the payments were conditioned upon the witnesses' truthfulness, materiality, and helpfulness, because the payments had an effect on the witnesses' testimony and violated "the very heart of the integrity of the justice system.").³

Moreover, where a court rules that an agreement with a former employee is somehow improper, the penalties may be harsh. For example, in *Solvent Chemical Co.*, the plaintiff sought all documents related to the consulting activities of the defendant's former employee. The court, while noting that there was nothing improper about reimbursing a former employee for expenses related to the litigation and a reasonable hourly fee for his time, ruled that the consulting agreement was improper because of an indemnity agreement and covenant not to sue. *Solvent Chem. Co.*, 166 F.R.D. at 290. Thus, the court ordered the defendant employer to produce the following: 1) the consulting agreement with the former employee and all related documents, 2) all documents shown or provided to the former employee in preparation for his deposition, 3) all documents reviewed by the former employee pursuant to the consulting agreement, 4) all records of communications between the defendant employer and the former employee and 5) all notes or writings prepared by the former employee related to his work under the consulting agreement. *Id.*

Based on the foregoing, when faced with questions regarding payments to former employees for their involvement in litigation, former employees may generally be paid for their time and expenses. However, care must be taken in evaluating what are "reasonable" payments. Factors to consider include: 1) the former employee's years of experience, 2) their personal knowledge of the subject matter of the litigation, 3) the nature of the litigation and 4) the former employee's current employment status. Notably, the ethics rules and opinions also provide that payments are permitted as provided by the applicable law.

D. A Former Employee's Personnel File

When opposing counsel propounds discovery requesting a former employee's personnel file, the question arises as to whether or not such information is discoverable. Such files would clearly contain confidential information about a non-party individual. At least one court addressing this issue raised this concern in considering a request for former and current employee files: "Discovery of the personnel files of non-party individual employees presents special concerns about the privacy rights of the individuals involved. Balancing the interests of the parties in obtaining relevant discovery against the privacy interests of individual non-parties can only be accomplished by in camera review of the requested files." *Consolidated Grain & Barge Co. v. M/V CSS Atlanta*, No. 99-687, 2000 U.S. Dist. LEXIS 5700, at *2 (E.D. La. Apr. 25, 2000). The court determined that in camera review of such files was appropriate. *Id.* Similarly, in a declaratory judgment action brought pursuant to ERISA, the court, in granting a motion for a protective order stated:

Disclosure of the information in the personnel records and benefits file would violate the privacy interests of the former and present employees in their non-public salaries, benefits, and other such personal information contained in the personnel files. Moreover, the records

produced by defendant contain information relating to salaries, and other compensation awarded to its executives, including stock option and bonus plans. . . . Since its salary and benefits programs play an integral part in defendant's ability to attract talented employees, this information is competitively sensitive. Additionally, the information in the personnel records and benefits file may cause the individuals who are the subject of such documents embarrassment. The information at issue is not important to the public health or safety, and defendant, the party benefiting from the protective order, is not a public entity or official. The case does not involve issues important to the public but, rather, a contractual matter between plaintiff and defendant.

Province v. Pep Boys, No. 99-2162, 2000 U.S. Dist. LEXIS 4929, 24 Employee Benefits Cas. (BNA) 2639 (E.D. Pa. Apr. 12, 2000). Notably, however, where a court determines that the non-privileged portions of a former employee are relevant, they will likely be discoverable. See, e.g., *Watts v. Kimmerly*, No. 1:95-cv-279, 1996 U.S. Dist. LEXIS 6203 (W.D. Mich. Apr. 12, 1996) (holding that non-privileged information in former employees files should be produced in a civil rights action).

E. Employee's Files

Under the Federal Rules of Civil Procedure, there is no indication that a corporation, in fulfilling its discovery obligations, must gather files and information from former employees. However, because the former employee's file may potentially contain documents that are helpful to your corporate client's position, the question arises as to whether or not you should, from a practical standpoint, gather the documents. On the one hand, if you know what is in the former employee's file, there will be no surprises down the road if opposing counsel obtains these documents. Notably, once a corporation's counsel has obtained the former employee's file, the documents are within the control of your employer client and will necessarily be discoverable.

F. Advice of Counsel, *i.e.*, Exit Strategies, Consulting Agreements

A former employee who is contacted by an adverse party during litigation may lead to disastrous consequences. The former employee may not be represented by counsel, may not understand how a plaintiff's counsel may interpret his or her statements, and may not understand whether or not his or her statements will constitute admissions of the former employer. Even worse, a former employee may unwittingly attempt to waive a pre-existing attorney-client privilege or work-product protection. See, e.g., *Apex Mun. Fund v. N-Group Sec.*, 841 F. Supp. 1423, 1433 (S.D. Tex. 1993) ("a one-year delay in taking any action to attempt to preserve the privilege" in documents retained and then disclosed by former employee waived the company's privilege). The question arises as to what in-house and litigation counsel can do to prevent such *ex parte* contacts and to educate employees *before* they leave the corporation as to their duties and any applicable privilege.

To educate employees before they leave the corporation, in-house counsel can introduce a number of steps to emphasize the importance of the attorney-client privilege and litigation work product. For example, in-house counsel can schedule periodic training sessions—particularly with employees within the "control group"—to reinforce these concepts and emphasize that such privileges and protections continue beyond the employees' employment with the corporation. In-house counsel can also draw on local outside counsel to educate the corporation about the specific law in the jurisdiction where they are located regarding *ex parte* communications, attorney-client privilege, and the work-product doctrine. Moreover, at the onset of litigation, attorneys for the corporation may need to contact former employees with confidential or privileged information to remind them of their responsibilities to protect such information from disclosure.

Another way to remind an employee of their responsibilities to the corporation is through the exit interview. At that time, a corporation can request the employee to sign a form or agreement that specifically reminds the employee that he or she may have confidential or privileged information related to potential future litigation and that any disclosure of such information could open them up to legal action. Notably; however, such an agreement may be discoverable. The agreement may also be an exhibit in future litigation if the former employee breaches the agreement in order to bar their testimony or as impeachment evidence.

After the employee leaves the corporation, thought may be given to hiring the former employee as a litigation consultant. Again, consulting agreements may be discoverable and thus, thought must be given to their wording. For example, such an agreement could be misconstrued if it anyway implies that payment is somehow related to the former employee's performance as a litigation consultant. However, a consulting agreement may be invaluable at reaffirming the former employee's commitment not to disclose confidential or privileged communications.

G. Conclusion

In sum, when considering issues related to former employees, it is clear that a defense practitioner must consider ethical and practical considerations. Defense practitioners must consider the discoverability of any communications, agreements, or files held by or concerning the former employee; must consider the extent to which former employees involved in litigation may be compensated for their time and expenses; and must consider the extent to which he or she may contact an opposing parties' former employee. A defense practitioner would be well advised to consult case law, ethics rules, and ethics opinions in the jurisdiction where communications between former employees and a corporation's counsel occurred, where the corporation is located, and where any litigation is pending. Even with this information in hand, the potential ethical issues may present a minefield with no clear path. What is clear; however, is that these issues should be considered and evaluated because any former employee that becomes involved in litigation could prove to be an extremely favorable witness, or may prove to be your worst enemy.

For an exhaustive review of the issues surrounding former employees, see Susan Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 Neb. L. Rev. 868 (2003).

Appendix 1

Fifty State Survey of Attorney Client Privilege in the Corporate Setting: What Have State Courts Done with *Upjohn*?

<i>Alabama</i>	Follows the Supreme Court’s decision in <i>Upjohn. Exxon Corp. v. Dept. of Conservation and Natural Res.</i> , 859 So. 2d 1096 (Ala. 2002); <i>Ex parte Alfa Mut. Ins. Co.</i> , 631 So. 2d 858 (Ala. 1993).
<i>Alaska</i>	Alaska has never a test for determining the privileged status of corporate communications. But see <i>Langdon v. Champion</i> , 752 P.2d 999 (Alaska 1988) (suggesting the comments to Rule 503 adopted the control group test).
<i>Arizona</i>	Arizona rejects the broad version of the subject matter test suggested by <i>Upjohn</i> . Arizona employs a unique “functional approach” that focuses on the relationship between the communicator and the need for legal services. <i>Samaraitan Found. v. Goodfarb</i> , 862 P.2d 870 (1993).
<i>Arkansas</i>	Arkansas has not expressly adopted a test, but it did cite <i>Upjohn</i> in <i>Courteau v. St. Paul Marine & Ins. Co.</i> , 821 S.W.2d 45 (Ark. 1991) for the proposition that statements written for a lawyer by hospital employees were within the privilege.
<i>California</i>	California follows a unique rule, a forerunner to <i>Upjohn</i> , which was laid down in 1964 in <i>D. I. Chadbourne, Inc. v. Superior Court of City and County of San Francisco</i> , 36 Cal. Rptr. 468 (Cal. 1964). In <i>Chadbourne</i> , the court focused on the employee’s intent and established eleven basic principles for applying the privilege to corporate matters. See <i>State Farm Fire & Cas. Co. v. Superior Court</i> , 54 Cal. App. 4th 625 (1997).
<i>Colorado</i>	Adopted <i>Upjohn</i> in <i>Nat’l Farmers Union Prop. and Cas. Co. v. Dist. Court For City and County of Denver</i> , 718 P.2d 1044 (Colo. 1986); see also <i>Alliance Constr. Solutions, Inc. v. Dep’t of Corr.</i> , 54 P.3d 861 (Colo. 2002)
<i>Connecticut</i>	Followed <i>Upjohn</i> in <i>Shew v. Freedom of Information Comm’n</i> , 714 A.2d 664 (Conn. 1998); see also <i>PAS Assoc. v. Twin Lab., Inc.</i> , No. CV 990174428S, 2001 Conn. Super. LEXIS 3392, at *9 (Conn. Super. Ct. Dec. 5, 2001).
<i>Delaware</i>	Delaware has not expressly adopted <i>Upjohn</i> , but has cited it repeatedly for its various propositions. <i>Zirn v. VLI Corp., Del Supr.</i> , 621 A.2d773, 781 (1993); see also <i>Grimes v. LCC Int’l, Inc.</i> , No. 16957, 1999 WL 252381 (Del. Ch. Apr. 23, 1999).
<i>Florida</i>	Florida adopted <i>Upjohn</i> in <i>Southern Bell Tel. & Tel. Co. v. Deason</i> , 632 So. 2d 1377 (Fla. 1994).
<i>Georgia</i>	Georgia adopted a modified subject-matter test in <i>Marriott Corp. v. Am. Acad. of Psychotherapists, Inc.</i> , 277 S.E.2d 785 (Ga. Ct. App. 1981) (citing <i>Diversified Indus., Inc. v. Meredith</i> , 572 F.2d 596 (8th Cir. 1977)).
<i>Hawaii</i>	Hawaii has never addressed the issue of corporate communications in the context of the attorney-client privilege.
<i>Idaho</i>	Idaho has never addressed the issue of corporate communications in the context of the attorney-client privilege.

<i>Illinois</i>	Illinois is the only state that has expressly rejected <i>Upjohn</i> in favor of the control group test. <i>Consolidated Coal v. Bucyrus-Erie Co.</i> , 432 N.E.2d 250 (Ill. 1982); <i>Day v. Illinois Power, Co.</i> , 199 N.E.2d 802 (Ill. App. Ct. 1964).
<i>Indiana</i>	Indiana adopted <i>Upjohn</i> in <i>Sullivan v. Fairmont Homes, Inc.</i> , 543 N.E.2d 1130 (Ind. Ct. App. 1989).
<i>Iowa</i>	Attorney-client privilege is codified at Iowa Code Section 622.10; see also <i>Squealer Feeds v. Pickering</i> , 530 N.W.2d 678 (Iowa 1995). No Iowa case discusses the privilege in terms of corporate communications.
<i>Kansas</i>	Cited but never adopted <i>Upjohn</i> in <i>State ex rel. Stovall v. Meneley</i> , 22 P.3d 124 (Kan. 2001). But see <i>Boyer v. Board of County Comm'rs</i> , 162 F. R. D. 687 (D. Kan. 1995) (Kansas federal court applying <i>Upjohn</i>).
<i>Kentucky</i>	Adopted <i>Upjohn</i> in <i>Lexington Pub. Library v. Clark</i> , 90 S.W.3d 53 (Ky. 2002).
<i>Louisiana</i>	Adopted the <i>Upjohn</i> subject matter test in <i>Turner v. Lowery</i> , 703 So. 2d 1 (La. 1997).
<i>Maine</i>	Cited but never adopted <i>Upjohn</i> in <i>Corey v. Norman, Hanson & DeTroy</i> , 742 A.2d 933 (Me. 1999). But see <i>Scott Paper Co. v. Ceilcote Co., Inc.</i> , 103 F.R.D. 591 (D. Me. 1984) (Maine federal court applying <i>Upjohn</i>).
<i>Maryland</i>	In <i>E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.</i> , 718 A.2d 1129 (Md. 1998), the court examined the various tests, but declined to adopt one.
<i>Massachusetts</i>	Adopted <i>Upjohn</i> in <i>National Employment Service Corp. v. Liberty Mut. Ins. Co.</i> , 1994 WL 878920 (Mass. Super. Ct. 1994).
<i>Michigan</i>	Adopted <i>Upjohn</i> in <i>Fruehauf Trailer Corp. v. Hagelthorn</i> , 528 N.W.2d 778 (Mich. Ct. App. 1995).
<i>Minnesota</i>	Minnesota courts have not substantially addressed the issue since the <i>Upjohn</i> decision, but adopted a similar test just before <i>Upjohn</i> was decided in <i>Leer v. Chicago, M., St. P. & P. Ry. Co.</i> , 308 N.W.2d 305 (Minn. 1981).
<i>Mississippi</i>	Mississippi has never addressed the issue of corporate communications in the context of the attorney-client privilege.
<i>Missouri</i>	Adopted a test similar to that of <i>Upjohn</i> in <i>DeLaporte v. Robey Bldg. Supply, Inc.</i> , 812 S.W.2d 526 (Mo. Ct. App. 1991).
<i>Montana</i>	Has not adopted a test, but has stated that the communications in question must at least be made for the purposes of legal advice <i>Kuiper v. Dist. Court of Eighth Judicial Dist. of State of Mont.</i> , 632 P.2d 694 (Mont. 1981).
<i>Nebraska</i>	Nebraska courts have not addressed the issue of the attorney-client privilege in the corporate setting. Neb. Rev. Stat. §27-503 (Reissue 1995).
<i>Nevada</i>	Adopted the <i>Upjohn</i> in <i>Wardleigh v. Second Judicial Dist. Court In and For County of Washoe</i> , 891 P.2d 1180 (Nev. 1995); see also <i>City of Reno v. Reno Police Protective Assoc.</i> , 59 P.3d 1212 (2002).
<i>New Hampshire</i>	New Hampshire has never addressed the issue of corporate communications in the context of the attorney-client privilege.
<i>New Jersey</i>	Adopted <i>Upjohn</i> in <i>Sicpa North America, Inc. v. Donaldson Enter., Inc.</i> , 430 A.2d 262 (N.J. Super. Ct. 1981).

<i>New Mexico</i>	Cited but never adopted <i>Upjohn</i> in <i>Public Service Company of New Mexico v. Lyons</i> , 10 P.3d 166 (N.M. Ct. App. 2000).
<i>New York</i>	New York courts have held that the attorney client privilege extends to corporate employees. <i>Rossi v. Blue Cross & Blue Shield of Greater N. Y.</i> , 542 N.Y.S.2d 508 (N.Y. 1989); see also <i>Niesig v. Team I</i> , 545 N.Y.S.2d 153 (N.Y. App. Div. 1989) (approving of the <i>Upjohn</i> test).
<i>North Carolina</i>	Cited but never adopted <i>Upjohn</i> in <i>Evans v. United Servs. Auto. Ass'n</i> , 541 S.E.2d 782 (N.C. Ct. App. 2001).
<i>North Dakota</i>	Cited but never adopted <i>Upjohn</i> in <i>Knoff v. American Crystal Sugar Co.</i> , 380 N.W.2d 313 (N.D. 1986).
<i>Ohio</i>	Adopted <i>Upjohn</i> in <i>Bennett v. Roadway Express, Inc.</i> , C.A. No. 20317, 2001 Ohio App. LEXIS 3394 (Ohio Ct. App. 2001); see also <i>Clapp v. Mueller Elec. Co.</i> , 835 N.E.2d 757 (Ohio Ct. App. 2005).
<i>Oklahoma</i>	Cited but never adopted <i>Upjohn</i> in <i>Fulton v. Lane</i> , 829 P.2d 959 (Okla. 1992).
<i>Oregon</i>	Cited but never adopted <i>Upjohn</i> in <i>Health Sci. Univ. v. Haas</i> , 942 P.2d 261 (Or. 1997).
<i>Pennsylvania</i>	Adopted <i>Upjohn</i> in <i>AMTRAK v. Fowler</i> , 788 A.2d 1053 (Pa. Commw. Ct. 2001); see also <i>Gould v. City of Aliquippa</i> , 750 A.2d 934 (Pa. Commw. Ct. 2000).
<i>Rhode Island</i>	Cited but never adopted <i>Upjohn</i> in <i>Mortgage Guar. & Title Co. v. Cunha</i> , 745 A.2d 156 (R.I. 2000).
<i>South Carolina</i>	South Carolina has never addressed the issue of corporate communications in the context of the attorney-client privilege.
<i>South Dakota</i>	South Dakota has never addressed the issue of corporate communications in the context of the attorney-client privilege.
<i>Tennessee</i>	Adopted <i>Upjohn</i> in <i>Schneider v. Troxel Mfg. Co.</i> , 1988 WL 130351 (Tenn. Ct. App. 1988).
<i>Texas</i>	Adopted <i>Upjohn</i> in Texas Rule of Evidence 503 (adopted 1998); see also <i>In re Monsanto Co.</i> , 998 S.W.2d 917 (Tex. Ct. App. 1999).
<i>Utah</i>	Utah has never addressed the issue of corporate communications in the context of the attorney-client privilege.
<i>Vermont</i>	Adopted <i>Upjohn</i> in <i>Baisley v. Missisquoi Cemetery Ass'n</i> , 708 A.2d 924 (Vt. 1998)
<i>Virginia</i>	Adopted <i>Upjohn</i> in <i>Va. Elec. and Power Co. v. Westmoreland-LG & E Partners</i> , 526 S.E.2d 750 (Va. 2000)
<i>Washington</i>	Cited but never adopted <i>Upjohn</i> in <i>Sherman v. State</i> , 905 P.2d 355 (Wash. 1995).
<i>Washington D.C.</i>	The District of Columbia has never addressed the issue of corporate communications in the context of the attorney-client privilege.
<i>West Virginia</i>	Adopted a test similar to <i>Upjohn</i> in <i>Dent v. Kaufman</i> , 406 S.E.2d 68 (W. Va. 1991).
<i>Wisconsin</i>	Adopted <i>Upjohn</i> in <i>Herget v. Northwestern Mut. Life Ins. Co.</i> , 487 N.W.2d 660 (Wis. Ct. App. 1992).
<i>Wyoming</i>	Adopted a test similar to <i>Upjohn</i> in <i>Strawser v. Exxon Co., U.S.A.</i> , 843 P.2d 613 (Wyo. 1992).

Endnotes

¹ The term “or court order” was added to Rule 4.2 by the ABA in 2002. Rule 4.2 is essentially the same as DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility, which states:

During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

ABA Model Code of Professional Responsibility DR 7-104(A)(1).

² Notably, the question may also arise as to which State’s ethics rules apply to this or any other situation. ABA Model Rule 8.5(b)(1) provides that litigation-related conduct is governed by “the rules of the jurisdiction in which the tribunal sits.” In contrast, conduct outside of Rule 8.5(b)(1)—including conduct occurring before a lawsuit is filed—is governed by “the rules of the jurisdiction in which the lawyer’s conduct occurred or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.” ABA Model Rule 8.5(b)(2).

³ The court; however, also noted that it would have permitted payments made for actual expenses “as permitted by law,” and that the court’s opinion only pertained to payments made for the purpose of obtaining a witness’ testimony. *Id.* at 1526 n.11.