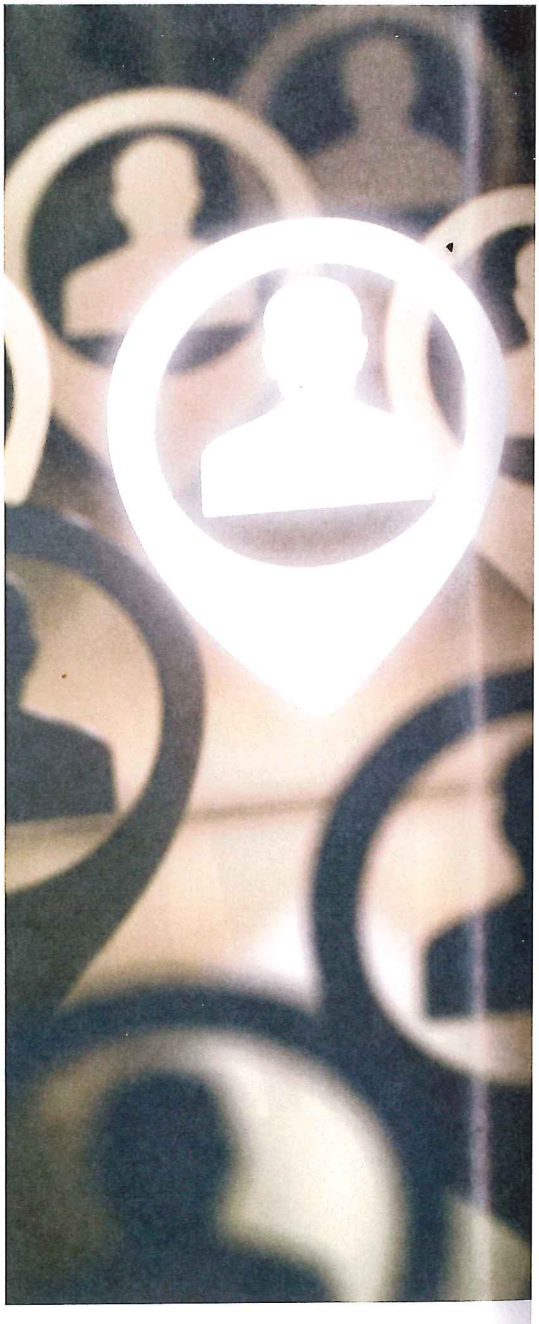
BY MARC R. LIEBERMAN & ANDREW L. McNICHOL

He Doesn't Work Here Anymore

Are Our Communications With Him Still Privileged?



It's day 25 of trial in your defense of a multimillion-dollar "bet the farm" case. You are defending the cross-examination of your company's pivotal witness, its *former* CEO, whose conduct gave rise to the plaintiff's claims.

Out of the blue, plaintiff's counsel insists, during his cross-examination of the *former* CEO, that he is entitled to discover the substance of all communications the former CEO had with *you*, the company's defense counsel, after the CEO left the company. You object, *presuming* that all of your communications with a former senior-level employee are protected by the attorney–client privilege.

As luck would have it, there is a break in testimony before the court addresses the issue, and you hurriedly attempt to confirm your suspicions that the privilege applies to former as well as current company employees. You are surprised to learn there is no bright-line rule in Arizona that says counsel's communications with a former employee of his client are protected from disclosure, although there is substantial case law from other jurisdictions suggesting that such communications should be protected.

This article demonstrates why counsel's communications with a key former employee generally will be protected, and why.

The Attorney–Client Privilege Under *Upjohn*

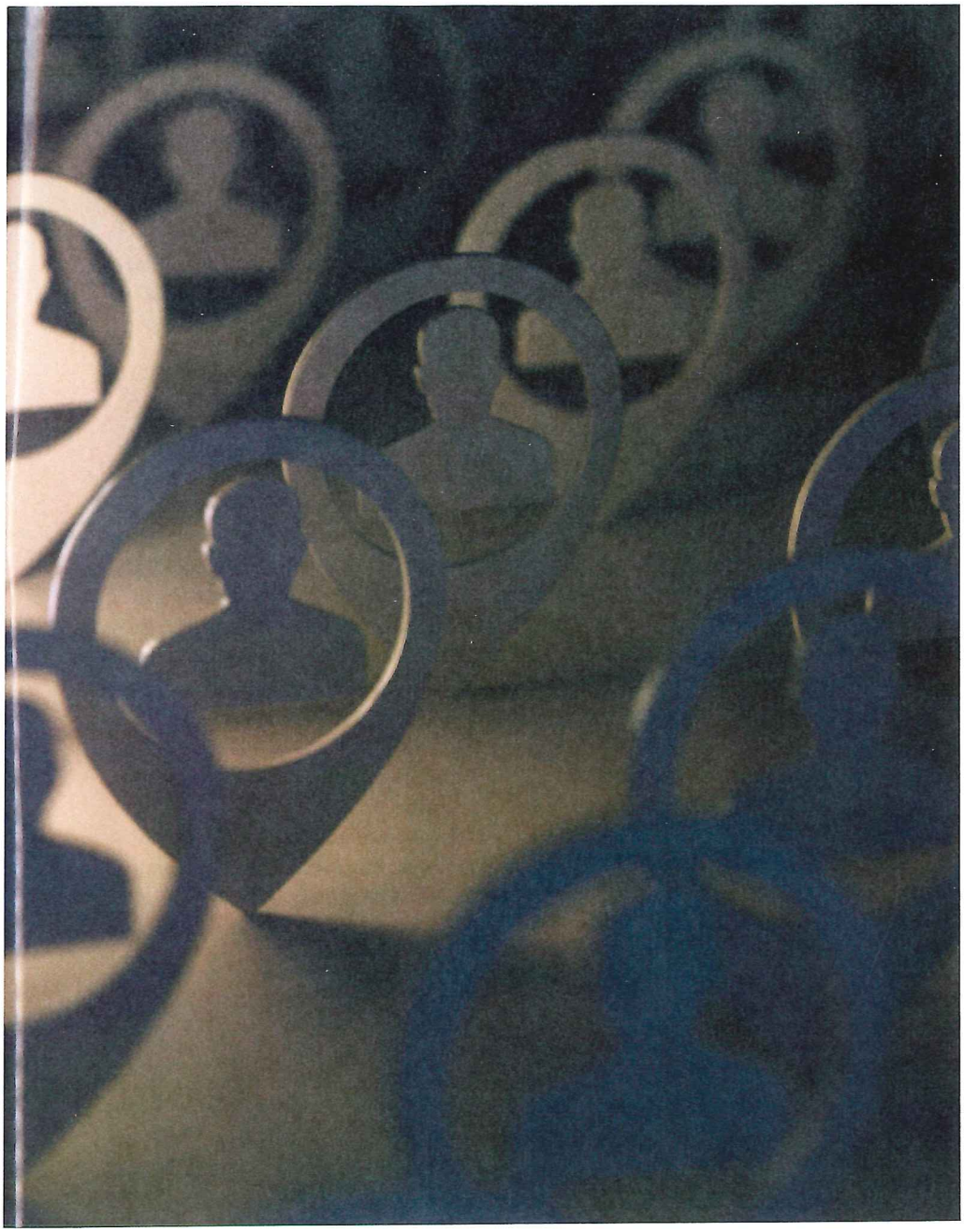
In Arizona, the attorney–client privilege applies to confidential communications between counsel and client made for the purpose of securing or rendering legal advice.[1] But determining the identity of the client is not always as simple as it appears. When the client is a natural person, application of the privilege is relatively straightforward: It applies to communications between the individual and the attorney and no others. But when the client is a corporation, governmental entity, or other organization, application of the attorney–client privilege is more muddled. A corporation, as a legal fiction, has no mouth or ears and can only "speak" or "hear" through its agents, officers, and employees.[2] Both state and federal courts have struggled to create a definition of the attorney–client privilege applicable to organizational clients that is neither over- nor under-inclusive. Although a number of courts initially adopted a "control group" test, the U.S. Supreme Court, in *Upjohn Co. v. United States*,[3] eschewed that test in favor of a more functional test, which looks to the nature of the communication rather than the communicator.

Although *Upjohn* did not address whether communications with former employees may be privileged, in his concurring opinion, Chief Justice Burger asserted that:

> a communication is privileged at least when, as here, 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 performing any of the following functions: (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.[4]

Arizona Supreme Court Adopts *Upjohn*

In *Samaritan Foundation v. Goodfarb*,[5] the Arizona Supreme Court adopted *Upjohn*'s functional approach to the attorney–client privilege. The relevant inquiry, under *Samaritan*, as to whether communications between corporate employees and counsel for the corporation are privileged is the nature and purpose of the communication rather than the identity or position of the corporate employee. Following *Samaritan*, communications between corporate counsel and



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low-level employees without decision-making authority may be privileged: "The defining characteristic of this functional approach is the nature, purpose, and context within which the communication occurs."[6]

The Court emphasized the need to:

> look at the relationship between the communicator and the incident giving rise to the legal matter, the nature of the communication and its context. If the employee is not the one whose conduct gives rise to potential corporate liability, then it is fair to characterize the employee as a "witness" rather than as a client.[7]

If, on the other hand, the employee's conduct has exposed the corporation to liability, the employee's statements are "the most important in enabling corporate counsel to assess the corporation's legal exposure and formulate a legal response" then the employee's communications with corporate counsel are privileged.[8] The Arizona Legislature subsequently codified *Samaritan* but did not expressly include or exclude former employees within the privilege.[9]

Courts Nearly Unanimous

Samaritan and *Upjohn* dealt with current employees of the organization rather than former employees. No Arizona court has expressly analyzed whether an attorney's communications with former employees of the corporate client occurring after the employee's termination are privileged.[10] However, seizing on Chief Justice Burger's concurring opinion in *Upjohn*, courts outside Arizona that have analyzed the issue have generally—though not uniformly—held that a former employee's communications with corporate counsel may be privileged.

Both circuit courts to consider the issue have extended the privilege to communications with former employees. In *In re Allen*,[11] the Fourth Circuit noted, "Most lower courts have followed the Chief Justice's reasoning [in *Upjohn*] and granted the privilege to communications between a client's counsel and the client's former employees. … [T]he 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."[12] The court continues, "In light of the purpose underlying the privilege, this conclusion seems warranted. … Accordingly, we hold that the analysis applied by the Supreme Court in *Upjohn* to determine which employees fall within the scope of the privilege applies equally to former employees."[13]

Analyzing the same issue, the Ninth Circuit likewise concluded, "Although *Upjohn* was specifically limited to current employees, the same rationale applies to the ex-employees (and current employees) involved in this case. Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties."[14]

Although a limited number of state and federal courts have declined to extend the privilege to communications with former employees, the clear weight of authorities is in favor of extending the privilege. For example, the District Court for the Southern District of New York noted, "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."[15] An Indiana District Court held similarly, noting that the purpose of applying the attorney–client privilege to communications with former employees is:

> to permit an attorney to gather the information necessary to advise his or her client. Because a corporation acts through its employees, in the case of a corporate client the information counsel needs typically must be obtained from those of the corporation's employees who were involved in the actions or incidents from which the legal issue at hand arose. Sometimes, as in this case, a person with critical knowledge of the relevant facts is no longer employed by the corporation, and in order to represent his or her client effectively the corporation's counsel must seek information from the former employee. We hold that when, as here, such information is communicated by the former employee to the corporation's counsel, those communications are protected by the attorney–client privilege.[16]

Continuing that trend, multiple District Courts have extended the attorney–client privilege to post-employment communications between a former employee and corporate counsel.[17]

The Minority Decisions

Only one district court and one state supreme court have declined to extend the privilege to communications with former employees. In *Clark Equipment v. Lift Parts Mfg. Co. Inc.*,[18] the District Court for the Northern District of Illinois held:

> Former employees are not the client. They share no identity of interest in the outcome of the litigation. Their willingness to provide information is unrelated to the directions of their former corporate superiors, and they have no duty to their former employer to provide such information. It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit. Thus, this Court holds that post-employment communications with former employees are not within the scope of the attorney–client privilege.

Clark's outlier result is likely because the court applied Illinois law, which still employs the control group test for privilege rather than *Upjohn*'s functional approach.[19]

In 2016, the Washington Supreme Court, in a 5–4 ruling over a vigorous dissent, refused to extend the privilege to communications with former employees. In *Newman v. Highland School District No. 203*,[20] that court held:

> Everything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship. … Without an ongoing obligation between the former employee and employer that gives rise to a principal–agent relationship, a former employee is no different

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> from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party."

The court adopted the bright-line rule that the termination of the employment relationship concurrently terminates the privilege with respect to new communications. Thus, in Washington, the privilege does not extend to postemployment communications between corporate counsel and a former employee.[21]

Four of nine justices dissented, arguing that the majority's refusal to extend the privilege was "at odds with the functional analysis underlying the decision in *Upjohn* and ignores the important purposes and goals that the attorney–client privilege serves."[22] "Former employees," the dissent recognized, "may possess relevant information pertaining to events occurring during their employment needed by corporate counsel to advise the client with respect to actual or potential difficulties. Relevant knowledge obtained by an employee during his or her period of employment does not lose relevance simply because employment has ended."[23] In the dissent's view, "[P]ostemployment communications consisting of a factual inquiry into the former employee's conduct and knowledge during his or her employment, made in furtherance of the corporation's legal services, are privileged."[24]

Arizona Courts Would Extend the Privilege

Like the Supreme Court in *Upjohn*, Arizona courts have recognized the purpose of the attorney–client privilege is to facilitate truthful communications between the lawyer and client so the attorney can provide effective legal advice.[25] In adopting *Upjohn*'s functional approach and rejecting the control group test, the Arizona Supreme Court recognized that "an approach that focuses solely upon the status of the communicator fails to adequately meet the objectives sought to be served by the attorney–client privilege."[26] Focusing solely on the communicator is both underinclusive—it excludes lower-level employees who may possess knowledge of the relevant facts—and overinclusive—it covers some persons based solely on their title.[27] Instead, Arizona courts look to the nature of the communication.

Given that Arizona courts employ *Upjohn*'s functional approach to the attorney–client privilege, Arizona would likely follow the heavy weight of federal authorities and extend the privilege to communications between corporate counsel and former employees of the corporation. Extending the privilege to former employees furthers the reasons behind the privilege: the facilitation of truthful communications and effective legal

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advice. As noted by other courts that have done so, extension of the privilege to former employees is not *carte blanche* to extend the privilege to every conceivable issue in perpetuity. It is limited to situations where: (1) the former employee was employed by the corporation during the time relevant to the attorney's current representation of the corporation, (2) the former employee possesses knowledge relevant to the attorney's current representation of the corporation, and (3) either the purpose of the communication is to assist the attorney in assessing the legal consequences, if any, of the employee's conduct or the purpose is to formulate appropriate legal responses to actions that have been or may be taken by others with regard to the employee's conduct.[28]

Practical Considerations

Practical considerations also support extension of the attorney–client privilege to former employees. In the modern business world, employees jumping from company to company are hardly uncommon. Litigation, in contrast, has accelerated little from its snail's crawl. By the time a case reaches discovery, much less trial, the incident spawning the litigation may be many years past. Employees with knowledge relevant to the litigation may have left the company for other prospects, been fired, or retired. To provide an effective defense, corporate counsel will often need to interview these former employees.

Extending the attorney–client privilege to such communications does not unfairly prejudice the opposing party. Communication of facts to the attorney does not, of course, make such facts privileged.[29] The opposing party may still depose the former employee about such facts; the only new limitation created by the extension of the privilege is that the opposing party may not inquire as to the former employee's communications with corporate counsel.[30] Thus, extending the privilege has substantial benefit.

Ethical Rule Impact

Extension of the privilege to former employees finds support in Arizona case law in a similar, albeit not identical, area. Arizona Ethical Rule 4.2 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 by law to do so."

In *Lang v. Superior Court*,[31] the Arizona Court of Appeals analyzed whether opposing counsel's *ex parte* communications with a *former employee* of a party are permissible under ER 4.2. The court noted that ER 4.2 is intended, *inter alia*, to "(1) prevent unprincipled attorneys from exploiting the disparity in legal skills between attorneys and lay people, (2) preserve the integrity of the attorney–client relationship, [and] (3) help to prevent the inadvertent disclosure of privileged information." In light of the purpose of the rule, the court held that ER 4.2 bars opposing counsel from having *ex parte* contacts with a former employee of the opposing party when "the acts or omissions of the former employee gave rise to the underlying litigation or the former employee has an ongoing relationship with the former employer in connection with the litigation."[32] In such cases, "the employee's acts or omissions in connection with any litigation that arises out of [the employee's conduct] can be imputed to the former employer for purposes of civil liability."[33]

Therefore, it is appropriate to bar *ex parte* communications with the former employee about the conduct giving rise to the litigation without the consent of the former employer's attorney.

Lang Supports Extension of *Samaritan* to Former Employees

The reasoning articulated in *Lang* prohibiting *ex parte* communications with former employees applies equally to the attorney–client privilege. The purpose of the privilege is 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.[34] Without the privilege, clients may be reluctant to disclose information to their attorney for fear that they could later be questioned about the disclosure.

Likewise, an attorney may be reluctant to provide legal advice knowing that such advice could be used against him or the client. Ethical Rule 4.2 is similarly designed to facilitate the attorney–client relationship. Without the rule, a savvy opposing counsel could use *ex parte* communications to discover privileged information. Recognizing that former employees may possess information vital to the former employer's case, the *Lang* court held that ER 4.2 bars *ex parte* communications with a former employee when the former employee's acts or omissions gave rise to the underlying litigation and the former employee has an ongoing relationship with the former employer in connection with the litigation. An Arizona court would likely take the next logical step and extend the protections of the attorney–client privilege to communications between corporate counsel and the former employee when the former employee's acts or omissions are at issue and the former employee has an ongoing relationship with the former employer in connection with the litigation. The extension preserves the integrity of the attorney–client relationship and permits the former employee to provide full and truthful information to corporate counsel. Were an Arizona court to hold otherwise, ER 4.2 would provide no real protection to the former employee because opposing counsel could simply depose the former employee about his communications with corporate counsel.

Samaritan and *Lang* Compel Protection

In accordance with the rules recognized by the overwhelming body of authorities, and especially *Samaritan*, it is clear that an Arizona court squarely presented with the issue would hold that the attorney–client privilege protects communications and trial materials exchanged between a former offi-

cer of a corporate client and the company's counsel, especially if that former officer was responsible for the company's administration and his actions gave rise to the dispute in question. Such an employee possesses unique knowledge of the events giving rise to the action. The communications between the officer and the company's attorneys will certainly help the attorneys provide the company an effective defense. Under the functional approach to privilege set forth in *Upjohn* and *Samaritan*, such communications should be considered privileged.

Moreover, if a former officer's conduct spawned the litigation at issue, and he has an ongoing relationship with the defendant company in connection with that litigation because his testimony is critical to the company's defense, *Lang* bars opposing counsel from engaging in *ex parte* communications with the former officer without the consent of the company's counsel.[35] In light of the similar purposes underlying the attorney–client privilege and the ethical bar on *ex parte* communications with former corporate employees, it is extremely likely that an Arizona court would extend the privilege to communications between the former officer and the company's counsel. Thus, it is likely that plaintiff's counsel would be precluded from discovering communications between the former officer and the defendant company.

Conclusion

While Arizona courts have not yet ruled whether to extend the attorney–client privilege to post-employment communications between corporate counsel and a former employee of the corporation, Arizona follows the Supreme Court's *Upjohn* test for determining whether the privilege applies, and the vast majority of federal courts considering the issue have extended the privilege to former employees in light of the purpose underlying the privilege as set forth in *Upjohn*. Moreover, Arizona courts have extended the bar on *ex parte* communications with a party to cover communications with former employees under similar reasoning. Therefore, Arizona courts would likely follow suit and extend the privilege to communications with former employees.

endnotes

1. *State ex rel. Corbin v. Weaver*, 140 Ariz. 123, 129 (App. 1984); *see also* A.R.S. § 12-2234.
2. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).
3. 449 U.S. 383 (1981).
4. *Id.* at 402-03 (Burger, C.J., concurring).
5. 176 Ariz. 497, 500-01 (1993).
6. *Id.* at 503.
7. *Id.* at 504.
8. *Id.*
9. The statute provides, in relevant part, "any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either: 1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member. [or] 2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member." A.R.S. § 12-2234(B).
10. There is no dispute that corporate counsel's communications with an employee occurring prior to the termination of the employment relationship are and remain privileged, assuming they otherwise meet the *Samaritan* requirements. The reason is clear: The communications were undoubtedly privileged at the time they were made, and the termination of the employment relationship does not waive or terminate the privilege. *See, e.g., Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999) ("any privileged information obtained by [employee] while an employee of [employer], including any information conveyed by counsel during that period, remains privileged upon the termination of her employment."); *see also Accomazzo v. Kemp*, 234 Ariz. 169, 172, ¶¶ 8-9, 319 P.3d 231, 234 (App. 2014) (client must waive privilege through an affirmative act); *State v. Macumber*, 112 Ariz. 569, 571, 544 P.2d 1084, 1086 (1976) (attorney–client privilege survives the death of the client). This article deals with the more difficult question of whether post-termination communications are privileged.
11. 106 F.3d 582, 605-06 (4th Cir. 1997).
12. *Id.*
13. *Id.* (*quoting Upjohn*).
14. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Lit.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981). To the extent the Ninth Circuit's extension

endnotes —continued

of the attorney–client privilege to former employees in *Petroleum Products* was *dicta*, the Ninth Circuit subsequently affirmed the extension of the privilege. *See Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1493 (9th Cir. 1989) (applying *Petroleum Products*.).

15. *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005).
16. *Cool v. BorgWarner*, 2003 WL 23009017, at *2 (S.D. Ind. Oct. 29, 2003) (internal citation omitted).
17. *See Hanover Ins. Co. v. Plaquemines Parish Gov.*, 304 F.R.D. 494, 498-500 (E.D. La. 2015) (The court "recognize[d] the existence of a privilege between counsel for a corporation and a former employee of the corporation, at a minimum, where (1) the former employee was employed by the corporation during the time relevant to the attorney's current representation of the corporation, (2) the former employee possesses knowledge relevant to the attorney's current representation of the corporation, and (3) the purpose of the communication is to assist the attorney 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"); *Peralta*, 190 F.R.D. at 41-42 (a communication with a former employee is privileged if the communication relates to the former employee's conduct or knowledge during his or her employment); *Infosystems Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 ("there may be situations where the former employee retains a present connection or agency relationship with the client corporation, or where the present-day communication concerns a confidential matter that was uniquely within the knowledge of the former employee when he worked for the client corporation, such that counsel's communications with this former employee must be cloaked with the privilege in order for meaningful fact-gathering to occur"); *In re Flonase Antitrust Lit.*, 723 F. Supp. 2d 761, 764-65 (E.D. Pa. 2010) ("Because [former employee's] testimony concerned matters within the scope of her former responsibilities with defendant corporation and because her conversations with defense counsel may be relevant to defendant's legal strategy, her communications with defense counsel fall within the attorney-client privilege"); *Gen-Probe Inc. v. Becton, Dickinson & Co.*, 2012 WL 1155709, at *3 (S.D. Cal. April 6, 2012) ("The corporation attorney–client privilege applies to current and former employees alike"); *Nicholls v. Philips Semiconductor Mfg.*, 2009 WL 2277869, at *2 (S.D.N.Y. July 27, 2009) ("Where the corporate employee is a former employee, communications ... of whose nature and purpose was for the corporation's counsel to learn facts related to a legal action that the former employee was aware of as a result of his or her employment, are privileged regardless of when they occurred"); *Amarin Plastics Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D. Mass. 1987) ("In some circumstances, the communications between a former employee and a corporate party's counsel may be privileged"); *Miramar Const. Co. v. Home Depot Inc.*, 167 F. Supp. 2d 182, 184-85 (D.P.R. 2001) (Extending the privilege to former employees "it is consistent with the purposes underlying the attorney-client privilege, to wit: to safeguard the communications between lawyer and client to encourage disclosures by the client to counsel that better enables the client to conform its conduct to the law and to present legitimate claims and defenses when litigation arises").
18. 1985 WL 2917, at *5-6 (N.D. Ill. Oct. 1, 1985).
19. *See id.*; *see also Barrett Industrial Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515 (N.D. Ill. 1990) ("The Illinois courts have not extended the protection of the attorney–client privilege to former employees and this court refuses to do so here").
20. 381 P.3d 1188, 1192-94 (Wash. 2016).
21. *Id.*
22. *Id.* at 1195 (Wiggins, J., dissenting).
23. *Id.* at 1197.
24. *Id.* at 1195.
25. *Samaritan*, 176 Ariz. at 501.
26. *Id.*
27. *Id.*
28. *See Hanover*, 304 F.R.D. at 498-500.
29. *See Samaritan*, 176 Ariz. at 501-02.
30. *See id.*; *see also Newman*, 381 P.3d at 1199 ("[T]he attorney–client privilege extends only to communications and does not protect the underlying facts." Even if the privilege is extended, "[Plaintiff] may continue to conduct ex parte interviews with the former [employees] for the purposes of learning any facts of the incident known to the [former employees]").
31. 170 Ariz. 602, 607 (App. 1992).
32. *Id.*
33. *Id.*
34. *See Upjohn*, 449 U.S. at 390.
35. *Lang*, 170 Ariz. at 607.