The Attorney–Client Privilege And Former Employees: History, Principle, And Precedent

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THE ATTORNEY–CLIENT PRIVILEGE AND FORMER EMPLOYEES: HISTORY, PRINCIPLE, AND PRECEDENT

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INTRODUCTION

When does attorney–client privilege protect communications between an attorney and her client’s former employee? Unfortunately, there is no simple answer to this question. In federal courts, privilege over communications with current employees is generally governed by the subject-matter test. Under this legal doctrine, communication is privileged when it regards subject matter within the scope of the employee’s position. The rationale for the doctrine is that it is often the lower-level employees who will have the information that an attorney needs. Extending the doctrine to former employees, however, has caused courts to stumble as they have attempted to reconcile evidentiary privilege and the corporate entity. The difficulty reconciling these two theories has resulted in a split among courts as to what the scope of privilege should be with former employees.

Attorneys will increasingly face circumstances where communication with a former employee is necessary. This is a function of at least three trends. First, the workforce turnover rate is significantly higher for the current generation than it was for past generations. Second, the backlog of cases in federal courts is continuing to grow, increasing the median wait-time. And third, the increasingly complex regulatory environment that businesses operate in makes it necessary for corporate attorneys to access a wide range of corporate knowledge in order to give fully informed legal advice. The consequence is that an employee is more...

4. See Samuel W. Cooper, Guideposts for Handling Corporate Investigations, 41 LITIG. 30, 30 (2015); Michel Rosenfeld, The Transformation of the Attorney–Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, & the Corporate Client’s Sec Disclosure Obligations, 33 HASTINGS L.J. 495, 542-44.
likely to leave before an attorney speaks with him and employees that have left are more likely to have information that is necessary for the corporate attorney.

There are currently three different approaches that courts have taken to the issue of corporate attorney–client privilege with former employees. This has resulted in some courts treating former employees no differently than any third-party witness, while some have extended privilege to only information gathering communications, and still others have extended protection to the same extent as current employees. This note proposes that the inconsistency is a symptom of the tension between three variables: corporate attorney–client doctrine, evidentiary privilege rationale, and the corporate-entity theory. Furthermore, this note concludes that extending privilege to former employees under the subject-matter test is the most logically sound approach.

To this end, Part I of this note provides a brief overview of how evidentiary privilege theory, corporate-entity theory, and the corporate attorney–client privilege developed. Part II categorizes and describes the three divergent approaches that courts have taken to assertions of privilege with former employees, and Part III explains how these divergent approaches reveal the tension between corporate-entity theory and evidentiary doctrine. Finally, this note concludes by suggesting that the most theoretically and doctrinally sound approach is to apply the privilege to communication with former employees to the same extent that the privilege is applied to communications with current employees.

I. Theory and Doctrine

A. Evidentiary Privilege Rationale

The adversarial system of adjudication has always allowed limited exceptions to the general rule that “the public has a right to every man’s evidence.” The attorney–client privilege is one of the oldest of these exceptions, dating to the time of Queen Elizabeth I. At that time, protecting the communication between a lawyer and his client was justified as an outgrowth of the attorney’s honor-bound ethical duty to protect the

5. See, e.g., Jaffee v. Redmond, 518 U.S. 1, 9 n.8 (1996).
rights of his client.\(^7\) Under this justification, disclosure of a client’s communication was considered a betrayal of the inherent right that a client had to trust his attorney. While attorney–client privilege has remained a fundamental component of the adversarial system, the justification for it has since shifted to a more limited, instrumental rationale.

1. The Instrumental Rationale for Evidentiary Privilege

By the mid-nineteenth century, the justification given for attorney–client privilege reflected a preference for the needs of the court over the rights of clients.\(^8\) According to this “instrumental” rationale, privilege is only justified when its practical benefit outweighs the high cost of obstructing the court’s search for the truth. Starting with the assumption that the “average layperson is so fearful that [a] revelation will later come back to haunt him or her . . . that he or she would not make the revelation without the assurance of confidentiality,” the instrumental rationale treats privilege as a necessary evil.\(^9\)

Professor J. Wigmore articulated what has perhaps become the most enduring test for the application of attorney–client privilege.\(^10\) In his judgment, communications should be protected only where the client: (1) seeks legal advice; (2) from a professional legal adviser; (3) for the purpose of obtaining legal advice; and the communication is (4) made in confidence (5) by the client.\(^11\) Because privilege is in derogation of the truth-seeking nature of the adversarial system, Wigmore urged courts to narrowly construe its application, stating that the benefits of evidentiary privilege “are all indirect and speculative; its obstruction . . . plain and concrete.”\(^12\) U.S. courts have since adopted Wigmore’s test and conservative construction, citing him as boilerplate in any decision on evidentiary privilege.\(^13\)

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8. Id. § 2291; Note, The Attorney–Client Privilege: Fixed Rules, Balancing, & Constitutional Entitlement, 91 Harv. L. Rev. 464, 465 (1977) [hereinafter Fixed Rules]; see also Rochester City Bank v. Suydam, Sage & Co., 5 How. Pr. 254, 257 (N.Y. Sup. Ct. 1851) (“[C]ounsel and sometimes courts have talked about the impropriety of disclosing that which was communicated in confidence . . . as if the betrayal of a trust, or confidence reposed, had something to do with the matter . . . [T]he rule in question rests upon no such foundation.”).
10. Id.; Fixed Rules, supra note 8, at 466.
12. Id. § 2291.
13. See Rice, supra note 1, at § 2:3 n.13 (listing cases); see also Wolfe v. United States, 291 U.S. 7, 14 (1934) (stating the function of marital privilege is to preserve the relationship); United States v. Gillock, 445 U.S. 360, 373 (1980) (denying the creation of a
2. The Humanistic Rationale for Evidentiary Privilege

In more recent years, scholars such as Professor Edward J. Imwinkelried have advocated for an alternative, rights-based rationale to attorney–client privilege. This “non-instrumental” or “privacy-based” rationale is predicated on weighting the client’s rights over those of the collective and is more closely related to the early, honor-based rationale. Imwinkelried calls this a humanistic rationale and argues that it is a more compatible with the ideals of the liberal democratic theory upon which the United States was built. In essence, his logical argument proceeds as follows:

1. Liberal democracies, such as the United States, recognize an individual’s right to autonomy.

2. To exercise and fully engage his autonomy, a person must be enabled to make intelligent choices.

3. To make intelligent choices, a person must be able to consult with third parties.

4. When consulting with third parties, the person must retain the ability to make an independent choice.

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14. See IMWINKELRIED, supra note 9, § 2.3.


16. IMWINKELRIED, supra note 9, § 2.3.

17. Id. § 5.3.3; Neil Weinstock Netanel, Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory, 88 CALIF. L. REV. 395, 407 (2000) (“Liberal democracy is a political system with representative governments elected by popular majority, the rule of law enshrined to protect individuals and minorities, and a significant sector of economic, associational, and communicative activity that is largely autonomous from government control.”).
5. To make a fully independent choice, the person must be able to trust the third-party to fully inform him.

6. To trust the third-party, there must be privacy in their communications.

7. Privacy in communications is preserved in our legal system through evidentiary privileges.

8. Therefore, the recognition of an evidentiary privilege between an attorney and his client is necessary to enable autonomy. 

This line of argument is particularly persuasive when considering that the relationship functions in a complex legal system where guidance is vital for the client. The client’s ability to make intelligent choices necessitates knowing what those choices are and potential consequences. While there is still a functional aspect to privilege under a humanistic viewpoint, the emphasis is on enabling the client rather than the court.

3. A Middle-Ground Rationale for Privilege

A third point of view is that the humanistic and instrumental rationales need not be mutually exclusive. Each approach assumes that circumstances exist in which privilege is needed, and even under a humanistic rationale there is a utility to the privilege in enabling the exercise of a fundamental right. Additionally, if the instrumental rationale is truly utilitarian, it should take into consideration the costs to all parties involved, including the cost to a client’s rights. If the cost of denying the client his right to make informed decisions is greater than the benefit to society, then the utilitarian must conclude that privilege should be granted. Thus, the distinction between the two rationales may be fairly characterized as one of degree rather than kind.

18. Imwinkelried, supra note 9, § 5.3.3.
19. Rosenfeld, supra note 4, at 505-06.
22. Wright & Graham, supra note 15, § 5422.
Where one lands on the spectrum between the humanistic and instrumental rationales reflects one’s underlying value judgments. For early legal scholars such as Bentham or Wigmore, truth was static and objective.\textsuperscript{24} Therefore, confidentiality was nothing more than an obstacle, and privilege could only exist if necessary because an individual has no right to obstruct justice. This theory, however, requires the assumption that the truth is something that can always be objectively determined.

However, if there are times when “truth is in the eye of the beholder,” elevating a duty to the system over the duty to the individual undermines the adversarial system itself.\textsuperscript{25} When privilege is based on a duty to the client, confidentiality ensures the client’s right to a fair adjudication. This view is more compatible with the attorney’s role of “pursu[ing] not the greater good, not what is best for the ’system,’ not even justice, but rather only the client’s cause.”\textsuperscript{26}

The distinction between the two rationales may make little difference in the archetypical attorney–client relationship, such as one when an individual contacts an attorney. Under either rationale, the client will receive protection over his communication with the attorney and the court need not ask whether it is allowing privilege due to a preference for liberal democratic or utilitarian ideals. The choice of rationales, however, has significant normative implications when the client is a corporation.

\textbf{B. Corporate-Entity Theory}

Corporate-entity theory refers to the set of assumptions made regarding the nature and purpose of the corporate form. Like the rationale behind evidentiary privilege, corporate-entity theory is both descriptive and proscriptive. That is, legal scholars use these concepts to explain existing doctrine as well as to suggest how doctrine should develop. In his article \textit{Theories of the Corporation}, David Millon notes that historically there has been a direct relationship between the theory that society has used to describe a corporation and the legal doctrines proscribed to regulate the corporation.\textsuperscript{27} How corporations are described, i.e. what positive theory is used to explain the nature of a corporation, gives rise to normative implications that can be used to evaluate legal doctrine.\textsuperscript{28} At the same time,

\begin{itemize}
\item \textsuperscript{24} See IMWINKELRIED, supra note 9, § 3.2.1.
\item \textsuperscript{25} Lawrence J. Vilardo & Vincent E. Doyle, III, \textit{Where Did the Zeal Go?}, 38 LITIG. 53, 57 (2011).
\item \textsuperscript{26} \textit{Id}.
\item \textsuperscript{27} See David Millon, \textit{Theories of the Corporation}, 1990 DUKE L.J. 201 (1990).
\item \textsuperscript{28} \textit{Id.} at 241.
\end{itemize}
the normative implications of legal doctrines have influenced corporate theory by lending support for one theory over another.  

1. Early Grant-Based Theory

Throughout history, regulation of the corporate entity has shifted between the public and private spheres of law.  

When the rules controlling a corporation emanate from the private agreement of those who formed it, the corporation is controlled by private law. When the rules controlling a corporation emanate from a sovereign government or monarch, the corporation is controlled by public law. The first corporate forms were conceived of as an extension of a nation’s sovereign power, governed by public law. In medieval England, early corporate forms were authorized to exist via a grant from the monarchy for very specific purposes, such as developing global trade. These entities were considered quasi-public, formed for the public good with grants of exclusive power coming directly from the government.  

At the start of the eighteenth century, leaders in the United States were skeptical of chartered corporations due to their experiences in Europe, where corporations were considered a tool of the oligarchy. Thus, a concern over the balance of power and freedom of trade created resistance to allowing free incorporation. Consequently, the privilege to incorporate was available only through a legislative grant and corporations were restricted to the specific activities granted.  

Ironically, this tightly controlled access to the corporate form resulted in an aggrandizement of power into the hands of those who had access to the legislature. In response, states passed “free incorporation”

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29. Id. at 241-42.
30. See W. S. Holdsworth, English Corporation Law in the 16th and 17th Centuries, 31 YALE L.J. 382, 394-96 (1922).
31. Id.
32. See Samuel Williston, History of the Law of Business Corporations Before 1800, 2 HARV. L. REV. 105, 111 (1888); see also 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2 (perm. ed., rev. vol. 1999) (“They were, rather, looked upon as public agencies, to which had been entrusted the duty of regulating foreign trade, just as the domestic trades were subjected to the government of the guilds.”) (citation omitted).
laws to separate the corporate form from legislative function. This doctrinal shift gave rise to a new question: free of its government charter, was the corporation an entity separate and apart from its creators, or was it an aggregate of the individuals who formed it?

Two competing theories formed along these two possibilities. The “aggregate” or “nexus-of-contracts” theory conceptualized the corporation as an aggregate organization of private individuals who had mutually agreed to engage in the pursuit of profit. The “natural entity” theory posited that the corporation, which had always been distinct and separate from its individual constituents, had evolved into a real entity under the law with rights and responsibilities concomitant with that of a natural person.

2. Natural-Entity Theory

As corporations grew larger and their ownership became more fragmented, the natural-entity theory appeared to most accurately describe the distinct and separate nature of the corporation from the individuals who held shares. Without a mandate to serve the public good, which had traditionally accompanied a government charter, the question arose as to how corporations would be held accountable for their actions. The theory of the corporation as a natural entity answered this question by imbuing the corporation with “obligations or responsibilities [no] different from those owed by natural persons.” This concept of “corporate citizenship” placed an affirmative duty on corporate management to consider more than just profit.

3. Aggregate-Entity Theory

Under the competing “aggregate” theory, the corporate entity is considered a logical outgrowth of partnership and property law principles.

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36. Id.
37. Id. at 182.
39. Id. at 112-13
40. Millon, supra note 27, at 216.
41. Id.
42. Id.
43. Id. at 217, 220 (citing E. Merrick Dodd, Jr., For Whom are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 (1932).
44. A.A. Berle, Jr., For Whom Corporate Managers Are Trustees: A Note, 45 HARV. L. REV. 1365, 1367 (1932); see also A. Berle & G. Means, The Modern Corporation and Private Property 275 (1932).
Under this theory, corporate management is a trustee of shareholder property and any consideration of interests other than maximizing shareholder wealth is inherently incompatible with the nature of the corporation.\textsuperscript{45} Social responsibility is achieved by the corporation pursuing what it is most capable of doing: generating wealth.\textsuperscript{46}

However, one consequence of restricting corporate actions to those that build shareholder wealth is that corporations have “a rational incentive to try to externalize the costs of their conduct to society . . . while internalizing the resulting excess profits reaped from those shortcuts.”\textsuperscript{47} As a result, public law is necessary to provide the checks and balances needed to protect those affected by the externalities created.\textsuperscript{48}

4. Experience Influencing Doctrine

The serious effect of externalities became evident after a wave of corporate takeovers in the mid-twentieth century. It was clear that profit-maximizing decisions sometimes came at a great cost to employees and other constituents.\textsuperscript{49} Hostile takeovers were often financially profitable for the shareholders, and therefore conceptually difficult to fight under an aggregate-entity theory. The takeovers resulted in the parceling up of companies, the loss of jobs, and the deterioration of geographic economic centers.\textsuperscript{50} In response, state legislatures began passing constituency statutes. These laws were expressly designed to give corporate management the legal authority to consider interests beyond shareholder wealth-maximization without fear that they would be sued by the shareholders.\textsuperscript{51} Thus, while aggregate-entity theory arguably dominated economic and corporate legal scholarship throughout the twentieth century, the doctrinal reality was an increasing emphasis on corporate autonomy.\textsuperscript{52}

\begin{footnotes}
\item[45] Millon, \textit{supra} note 27, at 221.
\item[46] See Milton Friedman, \textit{The Social Responsibility of Business is to Increase Its Profits}, N.Y. \textit{T}IMES, Sept. 13, 1970, at 33 ("[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.").
\item[48] \textit{Id.} at 357.
\item[49] Millon, \textit{supra} note 27, at 232.
\item[50] \textit{Id.}
\item[51] \textit{Id.}
\end{footnotes}
United States Supreme Court decisions *Burwell v. Hobby Lobby* and *Citizens United v. Federal Election Commission* provided a confirmation of this evolution. In both of these decisions, the Court built its analysis on the assumption that the corporation is a rights-bearing entity.

5. The Corporation as a Rights-Bearing Entity in *Hobby Lobby* and *Citizens United*

In *Citizens United v. Federal Election Commission*, the Supreme Court built its reasoning on the assumption that the corporation is an entity with rights and responsibilities independent of its constituents. In that case, the Court held that a corporation may financially support political candidates out of corporate funds. The decision has fueled the characterization of the corporation as a natural entity in legal doctrine. In his analysis of the decision, Delaware Supreme Court Chief Justice Leo Strine predicted the normative implications on legal doctrine:

> [I]f corporations are regarded as having equal rights with human beings . . . their managers must have the legal right to act with conscience and a regard for the full range of concerns that animate flesh-and-blood citizens of the United States. \(^{54}\)

Justice Strine further speculates that the combination of free political spending and profit maximization will logically lead to a weakening of government regulation. \(^{55}\) Without public law controlling the corporation’s externalities, society must necessarily turn to the corporation’s own moral obligation to control externalities, \(^{56}\) which creates a need for management to make decisions autonomously from shareholders.

In a similar endorsement of the rights-bearing nature of corporations, the Supreme Court’s decision in *Burwell v. Hobby Lobby* held that corporations are persons capable of exercising religion under the Religious Freedom Restoration Act of 1993 (RFRA). \(^{57}\) Professors Lyman Johnson and David Millon noted that the Court’s recognition of corporations as persons under RFRA grew out of two implicit assumptions. First, the Court accepted the assumption that, under state law, corporations are persons distinct and apart from any natural person. \(^{58}\) Second, the Court

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54. *Id.*
55. *Id.* at 390.
56. *Id.*
58. *Id.*
accepted the assumption that a corporation can have rights that exist separately and distinct from its constituents. Thus, without much analysis of the issue, the Supreme Court treated corporations as distinct rights-bearing entities.59

6. Experience Informing Theory

In hindsight, it is easy to see that the aggregate theory appeared to be an accurate description of the corporation because it was confirmed by experience of property and partnership law. When corporations became private entities apart from government charters, the corporation was a hybrid partnership and property. As society’s experience with corporations progressed, the concept of the corporation as an aggregate of individuals failed to fully encapsulate experience. As Professor Susanna Kim has pointed out:

We regularly observe and interact with corporations as entities. We read newspaper accounts of corporate mergers and acquisitions, follow lawsuits alleging corporate manufacturing of defective products, acknowledge corporate gifts to charities and good causes, and remit our monthly payments to utility companies. Our own experience tells us that corporations are not merely fictional creatures. To insist that they are denies the empirical reality of their existence.60

Legal doctrine has since responded by treating the corporate form increasingly like a rights bearing entity.

Other areas of law have also treated corporations as distinct entities apart from their constituents.61 Particularly relevant to the issue of privilege, the Model Rules of Professional Conduct Rule 1.13 states, “[a] lawyer employed or retained by an organization represents the organization and not its directors, officers, or other constituents.”62 Although the aggregate, wealth-maximization theory continues to be considered “the dominant framework of analysis for corporate law and corporate governance

59. Id.
60. Kim, supra note 34, at 786.
61. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. b (AM LAW INST. 2000) (“The so-called ‘entity’ theory of organizational representation . . . is now universally recognized in American law, for purposes of determining the identity of the direct beneficiary of legal representation of corporations and other forms of organizations.”).
today . . .,” it is so “despite the absence of legal authority.” Modern legal doctrine and popular experience strongly suggests that, doctrinally and conceptually, “the more sound approach is to view the corporation as a real person with separate and independent rights and obligations.”

C. The Development of Attorney–Client Privilege for Corporations

For over 100 years, federal courts, without much analysis, held that attorney–client privilege was available for corporate clients. In United States v. Louisville and Nashville Railroad Co., one of the earliest decisions to consider the issue, the U.S. Supreme Court allowed the privilege to apply to a corporation, stating that “the desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now.”

The issue did not receive full treatment until 1962, when the Northern Illinois District Court held that attorney–client privilege did not apply to corporations at all. In Radiant Burners, Inc. v. American Gas Association, Chief Judge William Campbell stated that “a corporation’s right to assert the privilege has somewhat generally been taken for granted by the judiciary, myself included, without a proper reliance on stare decisis or the promulgation anywhere of record of a clear legal analysis of the issue involved.” Equating privilege to the Fifth Amendment right, Judge Campbell reasoned that the attorney–client privilege is “personal in nature” and that “a corporation which is a mere creature of the state and not a natural entity should not, without legislation, be afforded a privilege historically created only for natural persons.”

Judge Campbell ventured further to say that even if the privilege applied, determining who represents the corporation for purposes of asserting the privilege would be prohibitively difficult. He speculated that

64. Kim, supra note 34, at 786-87.
68. Id. at 772.
69. Id. at 773.
70. Id.
71. Id. at 774-75.
the shareholder would be the most likely candidate because it is “only for their benefit that a corporation could make claim to the privilege.”

Judge Campbell’s reasoning reveals two interesting points. First, he rejects privilege for the corporation by characterizing it as personal and equating it to the constitutional right against self-incrimination. His choice of words sound like he is justifying privilege with a humanistic, rights-based rationale—despite the fact that Wigmore’s instrumental rationale had, by 1962, solidly established itself as a part of the American jurisprudential lexicon. Second, the fact that he concluded such a “personal” privilege was categorically incompatible with a corporation suggests that he considered the corporation as something other than a rights-bearing entity. This is further supported in his conjecture that the shareholder was the most likely candidate to receive the privilege, because the corporation exists “only for their benefit.”

Judge Campbell’s basic value judgments logically lead to this holding. The application of a humanistic evidentiary privilege rationale to an aggregate entity results in the conclusion that the corporation should not be afforded a privilege over communications because the corporation is a nexus of individuals and as a legal construction has no rights. Furthermore, should the privilege be applied, it would logically only apply to the shareholder, because it is he for whom the corporation exists. Thus, in the first opinion to analyze the application of attorney–client privilege to a corporate client, Judge Campbell’s fundamental views on privilege and corporate entity had a normative impact on his pronouncement of positive law.

Yet, the case did not end there. After allowing for additional briefing on the matter, Judge Campbell revisited the issue in a second order. He admits that but-for the problem of applying a personal privilege to the corporate form, he would personally have preferred to entitle corporations to the attorney–client privilege, due to “the large and complex nature of business transactions.” Nevertheless, he appears to be constrained to hold that evidentiary privilege simply cannot apply to a corporation.

On appeal, the Seventh Circuit reversed the decision. The court echoed the reasoning of *Louisville and Nashville Railroad*, pointing out that privilege had been available to corporations for more than a century and there was no precedent for its rejection. The court reasoned that the

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72. Id.
74. Radiant Burners, Inc. v. Am. Gas Ass’n, 320 F.2d 314, 324 (7th Cir. 1963) [hereinafter Radiant Burners III].
75. Id.
generally accepted nature of the issue required an accommodation in the rules of the privilege to conform with modern business practices.\textsuperscript{76}

Unlike the district court, the Seventh Circuit interpreted privilege as a public policy consideration rather than a personal right. Shifting the rationale to a clearly utilitarian, instrumental view, the court stated that the purpose of privilege is “encouraging full disclosure by the client.”\textsuperscript{77} The court disagreed with Judge Campbell that the difficulty in application of privilege to a corporate client was dispositive, but did not address whether privilege is dependent on the real or impersonal nature of the corporation.\textsuperscript{78} The court concluded that “a corporation is entitled to the same treatment as any other ‘client’—no more and no less.”\textsuperscript{79}

The Radiant Burners decision left the conceptual basis for corporate attorney–client privilege not much clearer than it was before. The court stated that the purpose was instrumental and accepted as established the availability of privilege to the corporate entity, without addressing the nature of the corporation. While not expressly adopting Judge Campbell’s shareholder-dominant view of the corporation, the court apparently saw no need to challenge it either. Rather, it stated that a difficulty in determining who the client is for purposes of applying privilege was not determinative. The key question that was not answered was how privilege could incentivize a corporation to communicate with its attorney, as the instrumental rationale assumes it does. As it happened, the Eastern District Court of Pennsylvania had confronted this logical disjunction head-on while the first Radiant Burner decision was pending appeal.

1. The Control-Group Test

   In City of Philadelphia v. Westinghouse Electric Corp., the Eastern District Court of Pennsylvania also concluded that attorney–client privilege extended to corporations but applied several important qualifications that largely resolved what Judge Campbell had forecasted would be an insurmountable difficulty. The court did so by articulating the “control group” test.\textsuperscript{80} Under this test, communications are privileged when they are

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{76} Id. at 323.
\item \textsuperscript{77} Id. (quoting Am. Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962)).
\item \textsuperscript{78} Id. at 322-23. \textit{But see} id. at 324 (Kiley, J., concurring) (“The corporation does not itself have attributes which give rise to the need of intimate advice. . . . It does, however, have an economic nature because of which it needs legal advice in the same way that the early individual needed, and his contemporary counterpart needs, that advice.”).
\item \textsuperscript{79} Id.
\end{itemize}
\end{footnotesize}
made by an individual who is “in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney.” 81 The reasoning is that when an employee is in this position of control, the agent “is (or personifies) the corporation when he makes his disclosure to the lawyer.” 82

This test provides a more logically coherent connection between the instrumental rationale and the aggregate-entity theory. If privilege exists only to the extent that it encourages the client to fully communicate, the only individuals with an interest close enough to that of the corporation to be influenced by the existence of privilege are the ones in control. Perhaps reflecting the dominance of the aggregate-entity theory at the time, most federal courts used the control-group test until the 1981 Supreme Court decision Upjohn Co. v. United States. 83 The Upjohn decision adopted the subject-matter test, which had originated in the Seventh Circuit, the same circuit that had reversed Judge Campbell some years earlier.

2. The Subject-Matter Test

Nearly a decade after the control-group test was used in Westinghouse Electric, the Seventh Circuit expanded on its earlier reasoning from Radiant Burners II and established an alternative to the control-group test. 84 Using the “subject-matter test,” the court held that an employee’s communications are sufficiently identified with the corporation when “[1] the employee makes the communication at the direction of his superiors in the corporation” and [2] the subject of the communication is “the performance by the employee of the duties of his employment.” 85 The Eighth Circuit also adopted that test in Diversified Industries, Inc. v. Meredith, reasoning that the subject-matter test is more appropriate for corporate entities because it shifts the focus away from whom the attorney is communicating with to why the attorney is communicating with that person, 86 thus resolving the problem of determining who adequately represents the corporation.

The subject-matter test may resolve the issue of who represents the corporation for purposes of privilege by changing the direction of the inquiry, but it does not resolve the incongruity of the instrumental rationale

81. Id.
82. Id.
85. Id.
86. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977).
and the nature of the corporation. Rather, the reduced emphasis on who is speaking under the subject-matter test further estranges the relationship between providing privilege and creating an incentive to communicate.

i. Upjohn Company v. United States

In *Upjohn Co. v. United States*, the Supreme Court expressly declined to establish a broad rule but cited the *Diversified Industries* test with approval and rejected the control-group test altogether. In its analysis, the court did not linger on the nature of a corporation, stating only that it is “an artificial creature of the law.” As for the difficulty of applying privilege to a corporate entity, the Court stated it “has assumed that the privilege applies when the client is a corporation, and the Government does not contest the general proposition.”

To explain its departure from the control-group test, the Court started with the basic proposition that the purpose of privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” The Court went further by reasoning that “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.”

The decision in *Upjohn* rests on three basic assumptions: (1) the attorney–client privilege exists for corporations; (2) the privilege is justified under a utilitarian theory; and (3) the corporation is an artificial entity. While these three assumptions are the same ones that the court in *Diversified Industries* began with, the Court in *Upjohn* allows for a wider scope by enlarging privilege to include consideration of the lawyer’s need for information, separate and apart from the client’s need for advice.

After *Upjohn*, communications between an attorney and his client’s employees are privileged if (1) the communications are made by an employee acting as such; (2) the communications were made at the direction of corporate superiors for the purpose of securing legal advice.

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88. *Id.* at 391-92.
89. *Id.* at 394-95. Disagreement exists as to the intended effect of the Court’s holding. See *Wright & Graham, supra* note 15, § 5483; Sexton, *supra* note 83, at 458-59 (pointing out that “the Justices rejected the control group test without embracing the subject matter test”).
91. *Id.* at 390.
92. *Id.* at 389.
93. *Id.* at 390.
from counsel; (3) the communications concerned matters within the scope of the employee’s corporate duties; and (4) the employee was sufficiently aware that he or she was being questioned in order for the corporation to obtain legal advice from counsel.  

3. The Recognized Incongruity Between the Subject-Matter Test and the Instrumental-Privilege Theory

In both Diversified Industries and Westinghouse Electric, Wigmore’s instrumental rationale was cited as the “purpose” behind evidentiary privilege. However, in what may be a late vindication of Judge Campbell’s struggle in Radiant Burners, commentators have subsequently noted that a strict instrumental rationale is inherently incompatible with the subject-matter test. A strict instrumental rationale would require the corporation to show that “but for” the evidentiary privilege it would not communicate openly with its attorney. Yet, the corporation cannot speak on its own but requires others to speak for it, so the incentivizing aspect of the instrumental theory would appear inapplicable to the corporation-as-client theory. Therefore, assuming the instrumental rationale, the control-group test would make more sense for determining who is included in corporate attorney–client privilege because it is those who control the corporation that are more likely to be influenced the existence of privilege.

II. CURRENT APPROACHES TO PRIVILEGE WITH FORMER EMPLOYEES

While the facts in Upjohn included communications between former employees and corporate counsel, the Court expressly declined to address whether former employees were included within the test, because

94. Id. at 394-95. Some states have retained the control-group test. In these states, privilege for communications with former employees is unlikely to apply because a former employee never satisfies the control group requirement that he or she be in a position to direct corporate action in response to legal advice. Becker, supra note 2, at 889-90; see, e.g., Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515 (N.D. Ill. 1990) (no privilege for former employees under Illinois law because they are not a part of the “control group”). Thus, these two subjects are beyond the scope of this note.
96. See, e.g., 24 WRIGHT & GRAHAM, supra note 15, § 5476; IMWINKELRIED, supra note 9, § 6.9.1.
97. WIGMORE, supra note 7, § 2291, at 552.
99. IMWINKELRIED, supra note 9, § 6.9.1 (citing Alexander, supra note 65, at 415).
the issue had not been raised below. In a concurring opinion, however, Justice Burger stated, “[I]n my view the Court should make clear now, that as a general rule, 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.” As the cases that follow demonstrate, the lack of a conceptual reckoning between corporate theory, privilege rationale, and the now-established attorney–client corporate privilege doctrine begins to become apparent as evidentiary challenges to communications with former employees stretched the doctrine to its logical limits.

Among jurisdictions that have adopted the subject-matter test, three general approaches have arisen to address the issue of privilege for communications with a client’s former employees. The first approach is to treat them no differently than any other third-party witness. The second approach construes privilege narrowly but recognizes a legitimate need for privilege when investigative, or information gathering, in nature. The third approach views former employees no differently than current employees and treats communications with former employees the same as communications with current employees under the Upjohn test.

As an initial matter, there does not appear to be any disagreement that communications between an attorney and a client’s employee stay privileged even after they leave the company. In other words, communication does not become unprivileged when an employee leaves.

A. Approach One: No different than any other third-party witness

Courts that have categorically denied evidentiary privilege over communications with former employees have generally done so on the basis that a former employee no longer acts as an agent or representative of

101. Id. at 402-03 (J. Burger, concurring) (emphasis added); see also Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 490 (7th Cir. 1970) (rejecting control-group test in fact pattern that included former employees but not making any distinction in its between current and former employees).
103. See, e.g., Peralta, 190 F.R.D. at 41.
104. See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981).
105. EDNA SELAN EPESTINE, THE ATTORNEY–CLIENT PRIVILEGE 119 (5th ed. 2007) (“Whatever communications were privileged communications during the course of the former employee’s employment should clearly remain privileged. No reason exists to terminate the privilege along with the termination of the employment.”); see also Peralta, 190 F.R.D. at 38, 41; Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303, 306 (E.D. Mich. 2000).
the client corporation.\textsuperscript{106} In\textit{ Clark Equipment Co. v. Lift Parts Manufacturing Co.}, the plaintiff claimed attorney–client privilege for communications between its attorney and a former employee.\textsuperscript{107} The Northern District Court of Illinois held that the privilege did not apply to former employees because “[f]ormer employees are not the client. They share no identity of interests 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.”\textsuperscript{108} The court concluded by saying that “it is virtually impossible to distinguish the position of a former employee from any other third-party witness who might have pertinent information about one or more corporate parties to a lawsuit.”\textsuperscript{109}

In another decision that rested on the lack of an agency relationship, the Northern District of California denied privilege over information-gathering emails between a bank’s former CEO and the attorney for the bank’s trustee during bankruptcy proceedings in\textit{ Schoenmann v. Federal Deposit Insurance Corp.}\textsuperscript{110} The attorney for the Trustee argued that he “was obtaining relevant information from [the former CEO] as a former officer to advise and represent the Trustee.”\textsuperscript{111} The court nonetheless denied privilege over the emails, stating, “[The former employee] was not communicating with the Trustee and [the Trustee’s] counsel to obtain legal advice and was not a client of the Trustee’s counsel.”\textsuperscript{112}

Finally, the technical inability of a former employee to fit within the precise wording of\textit{ Upjohn} has prevented some courts from extending attorney–client privilege. In\textit{ Infosystems, Inc. v. Ceridian Corp.}, the District Court for the Eastern District of Michigan denied the extension of privilege to a former employee because it interpreted \textit{Upjohn} as setting a strict

\footnotesize{\textsuperscript{106} See EPSTEIN, supra note 105, at 168 (stating opinion that privilege should not apply because “the former employee is . . . no longer an agent for the corporation and occupies a position no different than that of any stranger.”).

\textsuperscript{107} Clark, 1985 WL 2917, at *5.

\textsuperscript{108} Id.

\textsuperscript{109} Id. Contra Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (role of employee during employment is not equivalent to that of a bystander witness); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977).


\textsuperscript{111} Id.

\textsuperscript{112} Id.; see also Allen, Adams & Co. v. Harrison, 30 Vt. 219, 221 (1858) (no privilege because former employee not a party to the suit); Connolly Data Sys., Inc. v. Victor Tech., Inc., 114 F.R.D. 89, 94 (S.D. Cal. 1987) (no attorney–client privilege for former employee under California law because no longer representative of the company); Nakajima v. Gen. Motors Corp., 857 F. Supp. 100, 105 (D.D.C. 1994) (finding no privilege for former employee under D.C. law because former employee not seeking legal advice).}
requirement that communications be made “at the direction of corporate superiors.”\textsuperscript{113} Thus, once again, the court appears to deny privilege on the lack of an agency relationship. Reaching a similar conclusion as the \textit{Clark Equipment} decision, the court stated that “[c]ounsel’s communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witness.”\textsuperscript{114}

The \textit{Infosystems} court did, however, qualify its denial by leaving open the possibility that the moving party could show that the communicating ex-employee had a “present connection or agency relationship with the client corporation,” or that the communication “concerns a confidential matter that was uniquely within the knowledge of the former employee.”\textsuperscript{115} Because the defendant had not shown any special circumstances or even submitted the materials at issue for an \textit{in camera} review, the court denied the motion for a protective order.\textsuperscript{116}

\textbf{B. Approach Two: A qualified privilege for investigative communications}

The second approach recognizes a corporation’s need for information but distinguishes former employees on the basis that they lack a duty to the employer. Under this approach, courts have extended privilege over the attorney’s information-gathering communications but not over pre-deposition counseling. In \textit{Peralta v. Cendant Corp.}, the District Court for the District of Connecticut considered a pre-deposition communication between the defendant’s attorney and former employee.\textsuperscript{117} Following the lead of \textit{Clark Equipment}, the court stated categorically that \textit{Upjohn} could not be applied wholesale to former employees because the former employee has no duty to provide the information sought.\textsuperscript{118}

The court in \textit{Peralta} did leave open the possibility that investigative communications may be covered under certain circumstances, “if the nature and purpose . . . was to learn facts related to [the case] that [the former employee] was aware of as a result of her employment.”\textsuperscript{119} The test, the court said, should be “Did the communication relate to the former employee’s conduct and knowledge, or communication with defendant’s

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\textsuperscript{113} ~\textit{Infosystems}, 197 F.R.D. at 305 (citing \textit{Upjohn}, 449 U.S. at 394).
\textsuperscript{114} ~\textit{Id.} at 306.
\textsuperscript{115} ~\textit{Id.}
\textsuperscript{116} ~\textit{Id.}; \textit{See also} \textit{Shew v. Freedom of Info. Comm’n}, 714 A.2d 664, 670 (Conn. 1998) (holding no privilege unless special circumstances shown under Connecticut law).
\textsuperscript{117} ~\textit{Peralta v. Cendant Corp.}, 190 F.R.D. 38, 39 (D. Conn. 1999).
\textsuperscript{118} ~\textit{Id.}
\textsuperscript{119} ~\textit{Id.}
\end{flushleft}
counsel, during his or her employment?”

Several federal district courts have since adopted the Peralta test.

C. Approach Three: Privilege allowed under subject-matter test

Under the third approach, courts view former employees no differently than current employees. These courts extend privilege to communications with former employees to the same extent as current employees under the subject-matter test. Both the Fourth Circuit Court of Appeals and the Ninth Circuit Court of Appeals follow this approach.

In In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, the District Court for the Central District of California issued an order holding a corporate attorney’s pre-deposition “orientation sessions” unprotected by attorney-client privilege. The district court had reasoned that the opposing party must be able to “make full inquiry into the influences that may have affected the testimony.” The Ninth Circuit Court of Appeals reversed, holding that the communications were protected under Upjohn:

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

120. Id.
123. Id. at 1359.
potential difficulties. . . . The orientation sessions undoubtedly provided information which will be used by corporate counsel in advising the companies how to handle the pending lawsuits."124

The court also noted that Upjohn forbade discovery of what was said in the sessions regardless of whether the attorneys were acting as counsel for the employees at the deposition.125

In In re Allen, the Fourth Circuit Court of Appeals also extended privilege under the Upjohn subject-matter test to investigative communications with a former employee.126 The court cited the instrumental rationale for the attorney–client privilege, stating that attorneys “need . . . to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”127 Using this reasoning, the court held that the Upjohn analysis applied equally to former employees.128

III. THE TENSION BETWEEN EVIDENTIAL THEORY, CORPORATE THEORY, AND CORPORATE ATTORNEY–CLIENT PRIVILEGE DOCTRINE

So what is the proper scope of corporate attorney–client privilege for former employees? The answer depends on how we justify privilege and characterize corporations. If we accept that the instrumental rationale justifies privilege and that corporations are real entities, privilege arguably should not apply to corporations at all or, at most, the control-group test should be used. Under the control-group test, privilege for communications with former employees will never be privileged.

If we accept the instrumental rationale to justify privilege and the aggregate-entity theory for corporations, we reach a similar result. As Judge Campbell held, the difficulty of determining who within an aggregate of individuals is capable of holding privilege for the corporation may prove prohibitively difficult. As a compromise, we can allow those in a position capable of acting on legal advice to hold privilege as the closest proxy for

124. Petroleum Prod., 658 F.2d at 1361 n.7.
125. Id. at 1361.
126. In re Allen, 106 F.3d at 606.
127. Id. (citing Trammel v. United States, 445 U.S. 40, 51 (1980)).
the group. In this scenario, the control-group test once again makes more sense and former employees will be precluded.

Both of these scenarios suggest that current corporate attorney–client doctrine is simply incompatible with the instrumental rationale. One option, therefore, is to reverse Upjohn. This would be a triumph of theory over experience. If theory is the basis on which doctrine is built and doctrine accurately fits our experience, then logically we must question what our theory has become.

A. Experience Informing Theory: Reverse Engineering Upjohn

In A Post-Upjohn Consideration of the Corporate Attorney–Client Privilege, John Sexton points out that the Upjohn Court employed a “functional mode of analysis.” The decision “focuses primarily on the perceived purposes of the privilege.” If theory is the basis upon which doctrine is built, Upjohn started from the top down. The Court stated that the purpose of privilege is “to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” According to Sexton, this function is ultimately about enhancing the flow of information.

At first blush, this sounds very much like the instrumental theory, in that privilege is being used to encourage communication. However, a strict application of the instrumental rationale requires that privilege be the but-for cause for communication. As recognized earlier, the instrumental rationale is largely inapplicable in the context of a corporation because non-party employees do not need an incentive to obey their superior’s request for information. In Upjohn, privilege is seen as a necessity but not because the information wouldn’t otherwise be given by the speaker. Rather, it is a necessity because the information might not otherwise be sought by the corporation.

The Court in Upjohn put great weight on an attorney’s “need to know” the information that lower-level employees had. Starting with the statement that “it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation’s lawyers,” the Court effectively carved out an “enclave of privacy” in which that information could be transferred. By doing so, the Court was

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129. Sexton, supra note 83, at 473.
130. Id. at 459.
132. Sexton, supra note 83, at 462.
133. Upjohn, 449 U.S. at 389.
134. Id. at 391.
focused on the flow of information, without consideration of whether the evidentiary rationale would actually constitute but-for causation on the employee’s decision to speak. Thus, the Court cites Wigmore’s traditional rationale as the basis for evidentiary privileges, while granting privilege to encourage the client’s obtaining information rather than giving information. One possible reason for this is that the Court was enabling the real entity of the corporation to effectively access its “corporate knowledge.” To draw an anthropomorphic analogy, the corporate head needs to know what the hand is doing, or has done, to make fully informed decisions. Implicit and necessary in the application of privilege to current employees is an assumption that the corporation has some right to the information in the first place.

This shift moves away from the communicator as holder of the privilege and towards a paradigm in which the information is treated as corporate property. This is a logical extension of the long recognized doctrine that confidential business information is protectable property. Although the individual and the corporate entity are not physically the same, the law has created legal fictions to bridge the gap. In the context of an attorney-client privilege for individuals, making a distinction between the holder of information and the owner of information is unnecessary. When those roles are split, however, the instrumental rationale no longer functions.

The other function that Sexton extrapolated from the Upjohn was that the Court saw privilege as increasing corporate compliance with the law. As Sexton notes, this assumption relies on the concept of voluntary compliance as opposed to external regulation and implies a confidence that corporations will adequately self-regulate. Self-regulation, or voluntary internalization of externalities, in turn invokes a private law, entity-based conception of the corporation. This again suggests that the Upjohn opinion

135. See Restatement (Third) of Agency § 8.11 (Am. Law Inst. 2006) (“An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when (1), . . . the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent’s duties to the principal . . . .”); id. § 8.11 cmt. c (stating that a former agent may continue to have a duty to furnish information to the former principal, “[f]or example, if an agent arranges a transaction on behalf of a principal that is ongoing at the time their agency relationship ends, it may be foreseeable to the agent that the former principal will continue to rely on the agent to provide information relevant to the ongoing transaction.”).


139. Id. at 470-71 (“In essence, the Court told the IRS that a voluntary compliance strategy was better for the IRS than the IRS thought it was.”).
rests on an assumption that a corporation is an entity that can take into account constituents other than its shareholders: a natural-entity theory.

After deconstructing *Upjohn*, we find support for the real-entity theory of the corporation and a rights-based justification for privilege. Accepting both of these theories, the subject-matter test is conceptually complete. Privilege is extended to enable the entity to exercise its right to obtain full legal advice. Under this paradigm, communications with former employees should be protected to the same extent as communications with current employees.

A fourth possible paradigm exists that is worth noting. We could accept, as was implicitly done in *Upjohn*, that a rights-based rationale more accurately describes experience, and accept the aggregate-entity theory of the corporation. This appears to be the source of Wright’s criticism that the corporation cannot obtain a rights-based privilege because corporations “are not ‘persons’ in the same, full sense as individuals with moral views.”\(^{140}\) However, as previously discussed, experience tells us that corporations already are treated as “moral” entities and have been viewed as rights holders in many other contexts.\(^{141}\)

**B. Scope of Application to Former Employees**

Assuming that privilege should extend to former employees, the question logically arises as to what the scope should be. *Peralta* and its progeny allowed for the possibility of privilege but only when the communications were information-gathering in nature. Is this cautious approach better?

While a narrow construction of privilege rules has been generally accepted since the time of Bentham and Wigmore,\(^{142}\) Sexton concludes that *Upjohn* “commands that a broader, overprotective rule be chosen when it is difficult or impossible to determine whether the risks flowing from overprotection are greater or less than the risks flowing from underprotection.”\(^{143}\) He bases this conclusion on two principles. First, he notes that the principle of maximizing benefits and minimizing costs would favor flexible rules that conform to the facts of each circumstance.\(^{144}\)

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\(^{140}\) WMINKELRIED, supra note 9, § 6.9.1 (citing Kim, supra note 34, at 763); See also Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 285 (1998) (“Corporations . . . do not possess attributes of personal autonomy or the capacity for intimate relationships often thought important to justify privacy claims.”).

\(^{141}\) See Kim, supra note 34, at 792.

\(^{142}\) 81 AM. JUR. 2d Witnesses § 273 (2015).

\(^{143}\) Sexton, supra note 83, at 484.

\(^{144}\) Id. at 480.
Second, he notes that the rule must be sufficiently definite so that attorneys and clients know when their communication is protected.\textsuperscript{145} The benefits that led the Court in \textit{Upjohn} to confer protection over communications with employees—full communication and voluntary compliance—accrete at the time of communication, whereas the costs of the privilege are speculative and theoretical.\textsuperscript{146} Therefore, preferring over-inclusive rules is preferable to under-inclusive rules.\textsuperscript{147}

The fear of expanding privilege has its root in the function of privilege as an exception to a general rule of disclosure. \textit{Peralta} and its progeny reasoned that an over inclusive rule extending privilege to former witnesses would allow for the influence of witnesses who were essentially third parties to the litigation.\textsuperscript{148} However, the subject-matter test does not grant a formalistic privilege based merely on membership in a certain class of individuals, as employees who did not have any involvement beyond being a mere witness would not normally be given privilege in the first place.\textsuperscript{149} Additionally, former employees that qualify under the \textit{Upjohn} principles will likely be those who “(1) posses\textsuperscript{ed} decisionmaking (sic) responsibility regarding the matter about which legal help is sought, (2) [were] implicated in the chain of command relevant to the subject matter of the legal services, or (3) [were] personally responsible for or involved in the activity that might lead to liability for the corporation.”\textsuperscript{150} In this regard, a former employee could have more commonality of interest than current employees.\textsuperscript{151} Because the function of \textit{Upjohn} was to ensure that the corporation had access to a free flow of information, “[w]hat should be of

\begin{itemize}
\item \textsuperscript{145} \textit{Id.} at 484.
\item \textsuperscript{146} \textit{Id.} at 484-85.
\item \textsuperscript{147} \textit{Id.} at 484.
\item \textsuperscript{148} See \textit{Peralta v. Cendant Corp.}, 190 F.R.D. 38, 41 (D. Conn. 1999) (stating that communication regarding facts developed during litigation had the “potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously”).
\item \textsuperscript{149} See, \textit{e.g.}, \textit{D.I. Chadbourne, Inc. v. Sup. Ct. of S.F.}, 388 P.2d 700, 709 (1964) (“When an employee has been a witness to matters which require communication to the corporate employer’s attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness. \ldots Where the employee’s connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation’s business, the employee is no longer an independent witness, and his statement or report is that of the employer.”); \textit{see also} \textit{Hickman v. Taylor}, 329 U.S. 495 (1947) (holding that there was no attorney client privilege over communications with an employee who was a “mere witness”).
\item \textsuperscript{150} Sexton, \textit{supra} note 83, at 500.
\item \textsuperscript{151} \textit{In re Flonase Antitrust Litig.}, 879 F. Supp. 2d 454, 459 (E.D. Pa. 2012) (holding that independent contracts may be “functional employees” in certain circumstances).
\end{itemize}
concern is the status of that person at the time and in relation to the events communicated.”

Furthermore, there is a legitimate argument to be made that attorneys should be allowed to communicate in confidence with former employees prior to a deposition. While it is true that a former employee no longer personifies the corporate entity, their testimony regarding knowledge obtained within the scope of employment has the potential of implicating the corporation. Part of an attorney’s responsibility is to provide guidance to the client regarding the legal consequences of the client’s words. Without the guidance of legal counsel, a former employee “may make unintended admissions due to his lack of sophistication in the deposition process.”

Finally, drawing the line between information-gathering communications and counseling communications would often be prohibitively difficult. The court in Petroleum Products protected pre-deposition orientation sessions in part on the reasoning that the attorneys likely gathered information related to the representation during the sessions. Thus, limiting privilege to the scope of “information gathering” would muddy the waters rather than provide an easy guide for attorneys. As Justice Rehnquist stated in Upjohn, “[a]n uncertain privilege is little better than no privilege at all.”

CONCLUSION

Extending the subject-matter test to cover communications between a corporation’s attorney and former employee is preferable because it allows for the corporation to make autonomous, fully informed legal decisions. It also serves an instrumental purpose by encouraging corporations to conduct self-evaluative investigations in order to stop or

152. Id.
153. E.g., Joel S. Feldman, Bank Liability for Securities Fraud, 107 Banking L.J. 100, 108-09 (1990) (“Whether a witness includes or excludes certain terms of art to his deposition may determine the outcome of a dismissal motion or impact significantly on settlement.”); RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 116 cmt. b. (AM. LAW INST. 2000) (“Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness’s meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.”).
prevent harmful activity. These advantages outweigh the possibility that a “zone of silence” will result from protecting the communications.

Under the real-entity theory of corporations, it would make little sense to impede the free flow of information within the corporation to its legal advisors. Regardless of whether the individual holding the information is currently in an active agency relationship, information gathered during employment “belongs” to the corporation and might be attributable to the corporation. When an attorney needs this information to give competent representation, he should be able to talk with the former employee without concern. This is precisely what the subject-matter test and the Upjohn function analysis does with current employees.

In the case of former employees, it is sufficient that (1) the communication be made by a current or former employee, (2) to corporate counsel, (3) regarding matters within the scope of the current or former employee’s corporate duties, and (4) the current or former employee is aware that he or she is communicating in order for the corporation to obtain legal counsel.

Embracing the view that corporations are rights-bearing entities with the right to make autonomous decisions regarding legal action allows a workable framework for understanding why communication with employees and former employees alike should be given privilege when the communication concerns information within the scope of the individual’s current or former employment. While the concept of extending autonomy to a corporation may seem strange at first, it is no different than personifying the corporate form through giving it rights to own property, exercise religion, or make political donations. Giving a rights-based privilege to corporate communications with counsel would correct the conceptual fallacies that have developed under current doctrine and consequently clarify the scope of privilege with a client entity’s former employees.

157. See id. at 392 (stating that corporate attorney–client privilege serves public interest by allowing compliance with the “vast and complicated array of regulatory legislation”).
160. See Sexton, supra note 83, at 479 (stating that it is “fruitless [to] attempt to base doctrines of corporate attorney–client privilege on a simplistic conceptual identification of who in the corporation most resembles an individual client. A strength of the functional approach employed by the Upjohn Court is that . . . it focuses on the purposes of the corporate privilege.”).
161. See Anita L. Allen, Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law, 20 J. Marshall L. Rev. 607, 638 (1987) (proposing that a corporation could have a right to privacy if moral rights are seen as a benefit of being an active corporate citizen).