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ABSTRACT

Courts have struggled with whether an entity's attorney-client privilege can protect communications between the entity's lawyer and a nonemployee who has information the entity's lawyer needs to best advise the entity. The nonemployee might be a former employee. But increasingly in recent times, the nonemployee is an individual who was never an entity employee. Corporations and other entities have incorporated nonemployees in their economic enterprises in all sorts of roles—roles employees may have held in the past. Many courts have accepted that the privilege can apply to communications involving former employees.

When faced with nonemployees who are not former employees, some courts have used a functional equivalent analysis to decide whether the entity's privilege protects nonemployee communications. Some courts have applied this doctrine so that a nonemployee cannot be a representative of the entity client unless the nonemployee is the functional equivalent of an entity employee, focusing on whether the nonemployee has traits, that, in these courts' sometimes misguided opinion, are traits of employees. Some courts have required that the nonemployee have an even narrower set of traits that, if required of employees, would be incompatible with the accepted reach of the privilege for employees.

These approaches are flawed. A functional equivalent analysis that focuses on required traits of an entity employee in an employment law sense is becoming more and more useless as each day of the twenty-first century unfolds. The reality of entities of the twenty-first century is that nonemployees often have roles that employees had in the past. In addition,

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traits of employees, especially in post-pandemic times, may not match an employee definition based on earlier times. In any case, characteristics of the nonemployee that are important for employment law purposes generally do not relate logically with the entity's attorney-client privilege and its underlying rationale. In addition, the relationship of the functional equivalent analysis, as many courts have applied it, to agency principles is murky at best.

A rational functional equivalent analysis consistent with the goals and rationale of the entity attorney-client privilege must focus on two issues. First, is the nonemployee a source of information integral to the entity lawyer's representation of the entity? Second, does the nonemployee have a significant relationship with the entity and the matter—a relationship of closeness similar to the relationship an employee has to an employer? The focus is not on whether the nonemployee is the functional equivalent of an employee. The question is whether the nonemployee's relationship with the entity is the functional equivalent of an employee's relationship with the entity. What this sort of relationship might look like will vary from case to case. Economic entities of the post-pandemic twenty-first century are many and varied; their method of staffing and pursuing their economic goals are varied as well. A focus on the significance of the relationship provides consistency of analysis for all nonemployees, whether they be former employees or other types of nonemployees. The analysis is consistent with the goals of the entity privilege and can be applied to the many forms entities take in the future.

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I. INTRODUCTION

Courts have long agreed that corporations and other entities enjoy an attorney-client privilege.[1] Like individuals, corporations and other entities can communicate with their attorneys in confidence for the purpose of obtaining legal advice without fear that a court may compel disclosure of the communications. But the only way an entity like a corporation can communicate with counsel is through an individual, a representative of the entity, who communicates with the entity's counsel. Who might be such a representative for the purpose of an entity's privilege? Who can talk with the lawyer for the entity and have the conversation be protected by the entity's privilege?

The United States Supreme Court in 1981 decided *Upjohn Company v. United States*,[2] clarifying that a corporation's privilege can apply, not only when the corporation's attorney communicates with employees who are "control group" members[3]—generally, inhabitants of the "c-suite" of today[4] —but also when the entity's lawyer communicates with lower-level

1. *See* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318 (1915); *see also* John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 444 (1982).

2. 449 U.S. 383 (1981).

3. *Id.* at 391. The *Upjohn* opinion refers to the "control group" because the lower court had determined that only members of Upjohn Company's "control group" could be a representative of Upjohn. *Id.* The United States Court of Appeals for the Sixth Circuit had held that "'only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole.'" *Id.* at 390 (quoting United States v. Upjohn, Co., 600 F.2d 1223, 1226 (6th Cir. 1979)).

4. In the 2020s, such control group members might be referred to as members of the "c-suite." "'C-suite' employees are executive-level managers of an entity." Andrew Bloomenthal, *C-Suite*, INVESTOPEDIA (July 21, 2021), https://bit.ly/3ksemd1. The chief executive officer (CEO), chief financial officer (CFO), chief operating officer (COO), chief

employees. This is true if the entity lawyer needs those communications to gain information to properly advise the entity client so that the client may better conform its behavior to the law.[5] The individual's particular employee relationship with the entity, evaluated by considering factors discussed in the *Upjohn* opinion, along with the employee's possession of information vital to the lawyer's legal advice to the entity, justifies recognition of the employee, regardless of job title, as a representative of the entity client for purposes of the entity's attorney-client privilege.[6] When a lawyer for a corporation or other entity and such an employee with the relevant information communicate, the employee communicates as a representative of the entity and the entity's privilege protects that communication. If the lawyer has been clear that the lawyer does not represent the individual separately, the individual has no claim of individual privilege; the only privilege at issue is that of the entity.[7]

After the Supreme Court's *Upjohn* opinion, at least as a matter of federal law, an entity's employee, regardless of status, *could* be a representative of the entity when communicating with an entity lawyer if

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information officer (CIO), and Chief Legal Officer or General Counsel are generally C-suite employees. *See id.*

5. *See Upjohn*, 449 U.S. at 389 (discussing rationale); *see also infra* Part IV (discussing the *Upjohn* case).

6. The Court noted that the employees communicated with the corporation's counsel as the superiors of the employees has directed and that they did so knowing they were doing so for the purpose of obtaining legal advice for the corporation. *See Upjohn*, 449 U.S. at 394. The Court noted that the employees had key information that members of the control group did not have and communicated with the corporation's counsel about matters within the scope of their employment duties. *See id.* In addition, the Court noted that the communications were always treated as confidential. *See id.* While a much rarer situation, it is also possible that the attorney may need to communicate with an employee, even the lower-level employee, to convey legal advice. This situation is probably very rare because in the vast majority of situations the attorney can talk with higher-ranking employees and those employees can convey the information to the lower ranks.

7. To avoid any argument that the individual has a privilege that the individual controls, the lawyer for the entity must very clearly explain to the individual that the lawyer is the lawyer for the entity and does not represent the individual. A recent high-profile example of a claim of individual privilege in the midst of an entity representation occurred in the government's case against Elizabeth Holmes, the former chief executive of now-defunct Theranos. Holmes claimed that David Boies and the law firm of Boies, Schiller Flexner LLP represented her individually in addition to representing the entity, Theranos. *See* USA v. Holmes, 18-cr-00258-EJD-1 (NC), 2021 WL 2309980, at *4 (N.D. Cal. June 3, 2021). Holmes thus claimed her individual attorney-client privilege protected certain communications and could not be compelled absent her individual consent. *See id.* The court rejected this claim. *See id.*

For a discussion of situations in which the individual might have a claim of individual privilege, see Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109, 110 (2010) (discussing when the corporation's attorney might reasonably be believed by the individual to represent the individual such that the communications might be privileged). *See In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 125 (3d Cir. 1986) (setting standard for finding that corporation's lawyer also represents the individual officer).

that employee has information the lawyer needs to represent the entity and in light of the factors discussed in the *Upjohn* opinion.[8] The unresolved question after *Upjohn* was whether communications between *nonemployees* and the entity's lawyer are protected by the entity's attorney-client privilege.

When the nonemployee is a former employee of the corporation, many courts have held that the entity's privilege protects that nonemployee's communications with the entity's lawyer without substantive discussion of the issue.[9] But when courts have confronted the reach of the entity's privilege when the nonemployee has never been an employee of the entity and is involved in the entity's enterprise, perhaps in an independent contractor role, the courts have struggled with a rational analytical framework.

This struggle is problematic because the organizational behavior of entities, especially economic enterprises, has not been static in the years since the *Upjohn* opinion. Especially in the twenty-first century, entities in the world marketplace often use nonemployees in roles that were employee roles in the past. The stereotype of an entity having distinct boundaries is not as common in today's marketplace as it might have been just a few years ago.[10] Nonemployees now provide all sorts of services to all sorts of entities.[11]

As the involvement of nonemployees has become more pervasive, entity internal investigations by entity attorneys are evermore commonplace.[12] These investigations can be mundane, such as an investigation resulting from a slip-and-fall event, or they can be high-profile, headline-grabbing matters that affect the very existence of an entity.[13]

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8. While *Upjohn* involved a corporation, its teachings apply to other sorts of entities such as government units. *See, e.g.*, All. Constr. Sols., Inc. v. Dep't of Corr., 54 P.3d 861, 867–71 (Colo. 2002) (applying *Upjohn*'s teachings to the Colorado Department of Corrections, a state government unit).

9. *See infra* Part V (discussing courts' treatments of former employees).

10. Some courts have recognized this shift. *See, e.g.*, *In re* Flonase Antitrust Litig., 879 F. Supp. 2d 454, 460 (E.D. Pa. 2012) ("'corporations increasingly conduct their business not merely through regular employees but also through a variety of independent contractors retained for specific purposes'" (quoting EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 269 (A.B.A. eds., 5th ed. 2007))).

11. *See infra* Part II (discussing the shifting role of nonemployees).

12. *See generally* Douglas R. Richmond, *Navigating the Lawyering Minefield of Internal Investigations*, 63 VILL. L. REV. 617 (2018) (discussing the everyday nature of investigations and a variety of issues that arise in internal investigations, including privilege).

13. An example of a high-profile investigation is the investigation that resulted from claims that Baylor University football players had sexually assaulted women and that the University had responded inappropriately. *See* Doe 1 v. Baylor Univ., 335 F.R.D. 476, 481–83 (W.D. Tex. 2020). Baylor's Board of Regents engaged a law firm to investigate

In this environment, nonemployees involved with an entity may have information an entity lawyer needs to properly represent the entity client. The question of whether an entity attorney's conversation with such a nonemployee enjoys the protection of the entity's attorney-client privilege looms large.[14] Might a court view a nonemployee as a representative of an

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Baylor's response to Title IX and related situations. *See id.* at 481. A lesser profile investigation is that in United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009). In *Ruehle*, Broadcom Corporation had been identified by an investor rights group as having inappropriately backdated stock. *See Ruehle*, 583 F.3d at 602. Broadcom engaged outside counsel to investigate the allegations. *See id.*

14. This Article addresses whether a nonemployee can be a representative of entity client for purposes of the entity attorney-client privilege. There are two other *very different* claims that are sometimes also asserted when nonemployees are involved. Litigants sometimes assert that the communications involving the nonemployee are privileged by virtue of the *Kovel* doctrine or the common interest doctrine. *See, e.g.*, United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); United States v. Patel, 509 F. Supp. 3d 1334 (S.D. Fla. 2020); 10X Genomics, Inc. v. Celsee, Inc., 505 F. Supp. 3d 334 (D. Del. 2020). With both these doctrines, the claim is that the inclusion of a third party such as the nonemployee does not prevent application of the attorney-client privilege and does not waive the privilege that otherwise attaches. The usual rule of privilege is that the presence of a stranger to the attorney-client relationship at the time of the communication or later sharing a privileged communication with a stranger to the relationship destroys the privilege because it destroys the required confidentiality. *See In re* Chevron Corp., 650 F.3d 278, 289 (3d Cir. 2011) (showing the presence of third party destroys possibility of privilege protection); *see also In re* Pac. Pictures Corp., 679 F.3d 1121, 1126–27 (9th Cir. 2012) ("[V]oluntarily disclosing privileged documents to third parties will generally destroy the privilege.").

The *Kovel* doctrine is named after *United States v. Kovel*. *See Kovel*, 296 F.2d at 922. The *Kovel* doctrine extends the privilege to third parties who are "necessary, or at least highly useful, for the effective consultation" as a translator would be necessary if the attorney and client did not speak the same language. *Id.* In *Kovel*, a law firm represented a client regarding tax matters. *See id.* at 919. A grand jury subpoenaed an accountant employed by the law firm. *See id.* The accountant asserted the client's attorney-client privilege. *See id.* The court stated that an accountant, depending on the particular facts of the situation, might be like an interpreter, a third party "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." *Id.* at 922. The court stated that communications between the accountant and the client outside the presence of the lawyer could be privileged "if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice." *Id.* For an example of a *Kovel* claim that a court accepted, see generally Sampedro v. Silver Point Cap., L.P., 818 F. App'x. 14 (2d Cir. 2020). For an example of a *Kovel* claim that a court rejected, see generally Diamond Resorts U.S. Collection Dev., LLC v. U.S. Consumer Att'ys, P.A., 519 F. Supp. 3d 1184 (S.D. Fla. 2021). *But see* U.S. *ex rel.* Wollman v. Mass. Gen. Hosp., Inc., 475 F. Supp. 3d 45, 66 (D. Mass. 2020) (noting that a *Kovel* doctrine claim and a claim that the third party is a representative of the entity client).

Occasionally, a party may claim that communications involving a nonemployee are protected by the common interest doctrine. This is a claim that the nonemployee shares a common legal interest with the entity and thus there is no waiver resulting from the presence of the nonemployee during communications with the entity lawyer or attorney-client communications shared with the nonemployee. *See, e.g.*, *Patel*, 509 F. Supp. 3d at 1338 (holding that no common interest for a variety of third parties); *see also 10X Genomics*, 505 F. Supp. 3d at 337 (holding that common interest exception does not apply

entity for privilege purposes such that the entity's privilege protects the attorney's communication with that nonemployee?[15]

For example, an attorney for a hospital being sued for negligence regarding a patient's treatment needs to talk with everyone involved in the patient's treatment at the hospital so that the attorney can render proper legal advice to the hospital regarding its liability and defense. Federal courts and state courts following *Upjohn* would apply the hospital's attorney-client privilege to protect communications involving the hospital's attorney and nurses employed by the hospital at the time of the communication who have information about the patient's treatment.[16] Many courts would also apply the hospital's attorney-client privilege to protect that attorney's communications with nurses who were hospital employees at the time of the incident and have information about the incident, but who are former hospital employees at the time they communicate with the hospital's attorney.[17]

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to communications in acquisition process). Communications involving corporate insiders who are nonemployees usually do not fit within the parameters of this doctrine because the third parties do not usually share a legal common interest with the entity. *See generally* Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475 (2012) (discussing the common interest doctrine).

15. The privilege application would, of course, also depend on whether the other requirements of the privilege are satisfied. In an internal investigation, one of the more substantial privilege hurdles is proving that the investigation was for the purpose of legal advice. Some courts require proof that the investigation report and accompanying documents would not have existed if the corporation had not needed legal advice. *See, e.g.*, Guo Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 13–14 (D.D.C. 2021); *In re* Experian Data Breach Litig., SACV 15-1592 AG, 2017 WL 4325583, at *2–3 (C.D. Cal. May 18, 2017); *In re* Target Corp. Customer Data Sec. Breach Litig., MDL No. 14-2522, 2015 WL 6777384, at *2–3 (D. Minn. Oct. 23, 2015); *see also* Thomas E. Spahn, *Privilege and Work Product Protection for Corporate Investigations After Clark Hill: Part IV*, CORP. COUNS. BUS. J. (May 24, 2021), https://bit.ly/3EM8x25.

16. The Supreme Court in *Upjohn* stated that communications between the corporation's employees and the corporation's lawyer can be privileged by the corporation's privilege. *See infra* Part IV (discussing *Upjohn*); *see also In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 757–58 (D.C. Cir. 2014), *cert. denied sub nom.*, United States *ex rel.* Barko v. Kellogg Brown & Root, Inc., 574 U.S. 1122 (2015) (reasoning that privilege can apply to communications involving employees and lawyer for the corporation that are a part of an internal investigation of alleged illegal activities by the corporation).

17. The Supreme Court in *Upjohn* did not decide whether this privilege extended to conversations with former employees. *See Upjohn*, 449 U.S. at 394 n.3; *see also infra* Part IV.C (discussing the fact that this question was not decided). Even so, many courts have applied the privilege when the corporation's attorney communicated with former employees. *See, e.g.*, *In re* Coordinated Pretrial Procs. in Petroleum Prod. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), *cert. denied sub nom.*, California v. Standard Oil Co. of Cal., 455 U.S. 990 (1982) ("Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client."); *In re* Allen, 106 F.3d 582, 606 (4th Cir. 1997) (discussing the fact that privilege can apply when corporate lawyer communicates with former employees); *In re* General Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 527 (S.D.N.Y. 2015) ("[D]istrict courts in this

Should the hospital's privilege protect communications between the hospital's attorney and nurses who have information about the incident, were part of the treatment team, but who were never hospital employees? These nurses might be employees of a third-party entity that has contracted with the hospital to provide nurses with specialized training to assist in staffing the hospital. They might simply be individual independent contractor workers. Perhaps they work alongside hospital employees and other nonemployees for months, or even years, treating hospital patients.

Many courts have agreed that such nonemployees can be representatives of the client for purposes of the privilege.[18] Some courts, to identify these nonemployees, have applied an analysis that recognizes that a nonemployee of an entity can be a representative of the entity for purposes of the entity's attorney-client privilege if that nonemployee is the "functional equivalent" of an employee and has information the entity's lawyer needs to render proper advice to the entity.[19] Some courts have interpreted this functional equivalent analysis to be an analysis of whether

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Circuit have consistently held that the privilege also extends to 'conversations between corporate counsel and former employees of the corporation, so long as the discussion related to the former employee's conduct and knowledge gained during employment.'") (quoting *In re* Refco Inc. Sec. Litig., 2012 WL 678139, at *2 (S.D.N.Y. Feb. 28, 2012)); Vegnani v. Medlogix, LLC, Civil No. 19-11291-LTS, 2020 WL 5634349, at *2 (D. Mass. Sept. 21, 2020) ("Those courts which have addressed whether the privilege extends to former employees have largely concluded that it does, including two courts in this District."); *see also infra* Part V (discussing courts' treatments of former employees).

Other courts have decided not to view former employees as representatives of ex-employers for purposes of the privilege. *See* Newman v. Highland School Dist. No. 203, 381 P.3d 1188, 1193 (Wash. 2016) (en banc) (refusing to extend the entity's privilege to communications involving the lawyer for the entity and individuals who had been employees at the time of the incident being investigated but no longer employees at the time of the communications); *see also* Douglas R. Richmond, *The Attorney-Client Privilege and Former Employees*, 70 CATH. U. L. REV. 39, 54–55 (2021); PAUL R. RICE ET AL., THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:18 (2020) (discussing former employees); *infra* Part V.B (discussing *Newman* decision).

18. *See, e.g.*, Hudock v. LG Elec. U.S.A., Inc., Case No. 0:16-cv-1220-JRT-KMM, 2019 WL 5692290, at *7 (D. Minn. Nov. 4, 2019) (finding that communications of nonemployees were protected by the entity's privilege); Dialysis Clinic, Inc. v. Medley, 567 S.W.3d 314, 324–25 (Tenn. 2019) (finding that communications of nonemployees were protected by the entity's privilege).

19. This approach, a creation of the United States Court of Appeals for the Eighth Circuit in *In re* Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994), was an attempt to follow *Upjohn*'s theoretical underpinnings and analysis by focusing on the function of the individual vis-à-vis the entity and the goals of the privilege in evaluating the situation of a nonemployee. *See infra* Part VII.A (discussing *Bieter*).

See, e.g., Berisha v. Lawson, 973 F.3d 1304, 1318 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2424 (July 2, 2021) (mem.) (finding that nonemployee's communications with the corporation's attorney are protected by the corporation's attorney-client privilege); United States v. Graf, 610 F.3d 1148 (9th Cir. 2010); *Bieter*, 16 F.3d at 938; Harvey v. Great Circle, No. 4:19-CV-902-NAB, 2020 WL 6544237, at *13 (E.D. Mo. Nov. 6, 2020); Hermanson v. MultiCare Health Sys., Inc., 475 P.3d 484, 490 (Wash. 2020); Frank v. Morgans Hotel Grp. Mgmt. LLC, 116 N.Y.S.3d 889, 896 (N.Y. Sup. Ct. 2020).

the nonemployee is the functional equivalent of an employee as an employee might be viewed for purposes of employment law. With such an approach, whether the entity's privilege applies to a nonemployee's communications with an entity's lawyer hinges upon whether the nonemployee possesses characteristics that, in the court's view, are typical of employees. For some courts, the nonemployees must match a specific type of employee, even though the characteristics may not further the purposes of the privilege, and, in fact, may frustrate privilege goals enunciated in *Upjohn*.[20] These courts recognize a nonemployee as a representative of the entity client only if that nonemployee "looks like" the court's view of an employee or a subset of employees, regardless of the importance of the information that nonemployee possesses or the closeness of the nonemployee's relationship to the entity and the entity's enterprise.[21] Characteristics that courts suppose are traits of employees are not necessarily characteristics of employees of the twenty-first century. They are certainly suspect in the post-pandemic world. For example, post-pandemic employees may not work at the location of the entity.[22] Yet, some courts focus on work location.[23]

The functional equivalent analysis discussed by some courts also seems to ignore that, traditionally, anyone in a principal-agent relationship with the client in an attorney-client setting can be a representative of the client for privilege purposes. This is true for individual clients as well as entity clients. A nonemployee can be a representative of the entity client because that nonemployee is an agent of the principal, the entity.[24] Being

20. *See infra* Part VII.B (discussing, among other cases, Export-Import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (requiring that the nonemployee have a "key corporate job")); *see also Frank*, 116 N.Y.S.3d at 892 (analyzing criteria such as whether a third-party has "primary responsibility for a key corporate job and could make decisions on the corporation's behalf," and whether a third-party has "a continuous and close working relationship with the company's principals on matters critical to the company's position in litigation"); *In re* Dealer Mgmt. Sys. Antitrust Litig., 335 F.R.D. 510, 518 (N.D. Ill. 2020) (declining to adopt the doctrine but stated that the nonemployee did not, in any case, satisfy the elements of key corporate job, continuous and close relationship with principals on critical matters).

21. *See, e.g.*, People v. McQueen, 451825/2019, 2020 WL 1878107, *3 (Sup. Ct. N.Y. Cnty. Feb. 21, 2020) (noting "the third-party must assume the functions and duties of a full-time employee"); *Frank*, 116 N.Y.S.3d at 892 (noting that inquiry is whether a contractor performs "the functions and duties of [a] full-time employee" and has become "a de facto employee").

22. *See infra* Part II (discussing work location).

23. *See, e.g.*, United States *ex rel.* Wollman v. Mass. Gen. Hosp., 475 F. Supp. 3d 45, 68 (D. Mass. 2020) (discussing a nonemployee that had his own office not at the corporate entity's location, and had other clients).

24. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (AM. L. INST. 2000). Kentucky Rule of Evidence 503 defines "representative of the client" as follows:

> (A) A person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client; or

an agent is not the same as being "like" an employee.[25] Courts applying the functional equivalent doctrine are not clear on how the functional equivalent analysis relates to agency status when the question of attorney-client privilege application involves nonemployees of various sorts.[26] If a court is using its functional equivalent analysis as the only test of when a nonemployee can be a representative of an entity client for purposes of the entity's attorney-client privilege, and if that test is a narrow one focusing on the court's view of employee-like traits, a nonemployee who may be in a principal-agent relationship with the entity is not the functional equivalent of an entity employee and is therefore not a representative of the entity client for purposes of the entity client's attorney-client privilege. Such is a very flawed result.

This Article suggests that a proper identification of nonemployees who are representatives of the entity client for purposes of the privilege must be grounded in a more conceptual functional equivalent analysis. The *Upjohn* opinion clarified that employees, even low-level ones, can be representatives of the corporate entity client if those employees have information the entity's attorney needs to properly represent the entity client and consideration of other factors indicate that recognizing the employee as a representative of the entity client for purposes of the entity's privilege further the goals of the privilege.[27] Likewise, and for the same reason, an entity's privilege should apply to a nonemployee if the following is true:

> 1. the nonemployee has a significant relationship with the entity and the matter that is the subject of the entity's need for legal advice; and
> 2. the nonemployee has the information necessary for the entity's attorney to provide proper legal advice.

(B) Any employee or representative of the client who makes or receives a confidential communication:
(i) In the course and scope of his or her employment;
(ii) Concerning the subject matter of his or her employment; and
(iii) To effectuate legal representation for the client.

KY. R. EVID. 503(a)(2). At least regarding this rule, an employee is but one type of representative of the client; *see also infra* Part VI (discussing *Restatement* view of agent as representative of the client).

25. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (establishing that the principal "manifests . . . that the agent shall act on the principal's behalf and subject to the principal's control" and the agent agrees to this arrangement).

26. *See, e.g.*, *In re* Dealer Mgmt. Sys. Antitrust Litig., 335 F.R.D. 510, 517–18 (N.D. Ill. 2020) (discussing functional equivalence but not agency); *Frank*, 116 N.Y.S.3d at 891–93 (same). In contrast, in the Washington Supreme Court, the dissent in Hermanson v. MultiCare Health Sys., Inc., 475 P.3d 484, 493–94 (Wash. 2020) addresses agency and functional equivalence but as defining unrelated categories of nonemployees.

27. *See infra* Part IV (discussing *Upjohn*).

The functional equivalent analysis should not require that the nonemployee share the characteristics of an employee, but rather that the nonemployee have a "significant relationship"[28] with the entity and the matter at issue. The important factor is not that the nonemployee is the functional equivalent of an *employee*; the important factor is that the nonemployee's *relationship* with the entity is the functional equivalent to the close and significant *relationship* an employee has with an employer.

A focus on the significance of the relationship for privilege purposes eliminates the need in many cases for a separate agency analysis. An agency analysis, just as is true with a focus on employee characteristics, can unduly complicate the privilege analysis with factors unimportant to the purpose and rationale of the privilege.[29] Nonemployees can be agents of the entity though they are independent contractors[30] or even employees of other entities,[31] but agency analysis is unnecessary in light of the reality of a significant relationship with the entity. As the Arizona Supreme Court stated in *Samaritan Foundation v. Goodfarb*:[32] "[A]n approach that

28. *In re* Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994) (noting "nonemployees who possess a 'significant relationship to the client and the client's involvement in the transaction that is the subject of the legal services'"); *see also* Berisha v. Lawson, 973 F.3d 1304, 1318 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2424 (2021) (mem.) (quoting *Bieter* regarding the requirement of a "significant relationship"); *Hermanson*, 475 P.3d at 490 (quoting *Bieter* regarding the requirement of a "significant relationship").

29. Courts may not truly grasp agency as it applies in today's world and in these contexts. For example, many definitions of agency require the principal to have the right to "control" the agent. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (stating that the principal "manifests . . . that the agent shall act on the principal's behalf and subject to the principal's control" and the agent agrees to this arrangement); *see also* Boltz-Rubenstein v. Bank of Am., N.A., 624 B.R. 756, 762 (Bankr. E.D. Pa. 2021) (discussing the fact that both parties agree to the relationship and the principal controls the situation but all aspects of the agency can be implied from circumstances and conduct). In the context of the twenty-first century work environment, what is meant by "control"? As the *Introduction* to the *Restatement (Third) of Agency* states:

> The common-law definition of a relationship of agency uses concepts, such as "manifestation" and "control," that embrace a wide spectrum of meanings and that in this application are highly fact-specific. As a result, agency law covers a broader set of relationships than might be expected. Manifestations may be made indirectly and in generalized ways, and legal implications do not necessarily depend on precise statements made to specifically identified individuals. Likewise, a principal's right of control, which entitles the principal to give interim instructions or directions to the agent, is a broadly drawn concept.

RESTATEMENT (THIRD) OF AGENCY, intro. (AM. L. INST. 2006).

30. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (AM. L. INST. 2020) (explaining that independent contractors can be agents).

31. Agency can reach the employees of a third-party entity that is an agent of the host corporation. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (AM. L. INST. 2020).

32. 862 P.2d 870 (Ariz. 1993).

focuses solely upon the status of the communicator fails to adequately meet the objectives sought to be served by the attorney-client privilege."[33]

Of course, any nonemployee who has been authorized to act on behalf of the entity principal in matters relevant to the privilege application and who otherwise satisfies the requirements of agency is an entity agent. Such a nonemployee is therefore a representative of the entity for privilege purposes. The agency relationship is certainly evidence of the significant relationship needed for the functional equivalent analysis. But the touchstone of the functional equivalent analysis rests on the significance of the relationship, whatever its form. An individual can be a representative of the client entity for privilege purposes if that individual's relationship is that of an employee, an agent, or an independent contractor who otherwise has a significant relationship with the entity.[34]

Applying the functional equivalent analysis as described in this Article allows the privilege to evolve along with the evolution of entity behavior. Doing so does not cause the privilege to be too expansive. In 1990, the entity privilege would have protected a communication between an employee nurse who was part of the treatment team in the example above. In 2021, it can protect that same communication between a nonemployee nurse who was part of the treatment team and the hospital attorney who is investigating the patient's claim of negligence.

Courts should find the suggested functional equivalent analysis more manageable. The analysis should allow courts to more reliably and consistently discern situations of proper privilege application. While analyzing degrees of relationship requires the exercise of careful judicial judgment, judges are perfectly capable of making this determination.[35] As the Second Circuit once said in an earlier time when dealing with a different facet of the privilege:

> We realize also that the line we have drawn will not be so easy to apply as the simpler positions urged on us by the parties—the district judges will scarcely be able to leave the decision of such cases to computers;

33. *Id.* at 874.

34. *See, e.g.*, All. Constr. Sols., Inc. v. Dep't of Corr., 54 P.3d 861, 869 (Colo. 2002) (noting an "employee, agent, or independent contractor with a significant relationship not only to the . . . entity but also to the transaction that is the subject of the . . . entity's need for legal [advice]").

35. For an example of a court exercising such judgment in concluding a public insurance adjuster was a representative of an entity client though also a nonemployee (and other nonemployees were not), *see* Am. Ins. Co. v. Pine Terrace Homeowners Ass'n, No. 20-cv-00654-DDD, 2021 WL 2036541, at *3–4 (D. Colo. May 21, 2021).

> but the distinction has to be made if the privilege is neither to be unduly expanded nor to become a trap.[36]

This Article, in Part II, discusses the substantial increase in recent years in entity reliance on nonemployees as essential pieces in the enterprise puzzle. Part III explains the parameters of the attorney-client privilege and, in particular, the privilege for corporations and other entities as that privilege was applied in the time before the Supreme Court's *Upjohn* opinion. In Part IV, the Article discusses the *Upjohn* opinion regarding employees as representatives of entities for purposes of the entity's privilege. Part V discusses courts' treatments of former employees, a special category of nonemployee. Part VI discusses Restatement agency concepts. Part VII reviews courts' applications of the functional equivalent analysis regarding nonemployees who are not former employees. Part VIII suggests an improved functional equivalent analysis that can better guide courts in identifying nonemployees who should be viewed as representatives of the entity client. This analysis should focus on the relationship between the entity and the nonemployee in the context of the particular dispute at issue and the information the nonemployee has as a result of that relationship. This analysis should be a particularized consideration of the significance of the relationship in that context. This Article concludes in Part IX that this improved analysis aligns with the goals and rationale of the privilege as presented in the *Upjohn* opinion. The approach can accomplish the goals of the entity attorney-client privilege in the context of the constantly changing entity organizational behavior of the twenty-first century.

II. THE TWENTY-FIRST CENTURY AND ENTITY USE OF NONEMPLOYEES

Nonemployees provide all sorts of services in today's economic and other enterprises. For example, corporations often turn to nonemployees to provide human relations services or information technology services.[37] In the mid-twentieth century of Arthur Miller's *Death of a Salesman*, a corporate entity might have had a human relations department (although

36. United States v. Kovel, 296 F.2d 918, 922–23 (2d Cir. 1961) (discussing the fact that inclusion of a third party does not destroy the privilege if the third party is necessary (like a translator) for the representation to occur).

37. *See* G. Dautovic, *15 Must-Know Outsourcing Statistics for 2021*, FORTUNLY (Sept. 22, 2021), https://bit.ly/3AU7awd; Michael Stoler & Miles Underwood, *How Much Disruption? Deloitte Global Outsourcing Survey 2020*, DELOITTE (2020), https://bit.ly/2XJBcnt; Jessica Edgson, *27 Eye-Opening Outsourcing Statistics*, CAPITAL COUNS. (Apr. 2, 2021), https://bit.ly/3i5XpDE; Rebecca Baldridge, *Best HR Outsourcing for Small Businesses in 2021*, INC. (Feb. 11, 2020), https://bit.ly/3B9otKr; Dirk DeBie, *3 Types of Outsourcing in IT: Which One is Better to Choose?*, BUSINESSING (Dec. 11, 2020), https://bit.ly/2ZjDN8n.

perhaps called "personnel") that handled employment-related issues.[38] Today, however, many corporations enter outsourcing[39] contracts with third-party entities so that the third-party entity's employees provide all or many human relations services.[40] The third-party entity supplants the corporation's human relations department entirely or provides some of its employees to work with the corporation's employees. Occasionally, an entity contracts directly with an individual for services without a third-party employer in the mix. Yet, the entity engages the individual as an independent contractor so that the individual is not an entity employee.[41]

In this economic environment, even the definition of "employee" for purposes of employment law is fluid. Uber, Lyft, and other entities increasingly have used staffing models in which a large portion of the entity workforce is not within the employee classification under traditional employment law classification schemes. Responding to the social inequities such an approach creates when workers are not entitled to protections available to employees,[42] the California Supreme Court in 2018 adopted a classification scheme for purposes of employment law that results in more workers earning an employee classification rather than an independent contractor classification.[43] The employee classification issue

38. *See* ARTHUR MILLER, DEATH OF A SALESMAN (1949).

39. Outsourcing has been described as follows:

> Outsourcing is the business practice of hiring a party outside a company to perform services or create goods that were traditionally performed in-house by the company's own employees and staff. Outsourcing is a practice usually undertaken by companies as a cost-cutting measure. As such, it can affect a wide range of jobs, ranging from customer support to manufacturing to the back office. Outsourcing was first recognized as a business strategy in 1989 and became an integral part of business economics throughout the 1990s.

Alexandra Twin, *Outsourcing*, INVESTOPEDIA (Aug. 29, 2021), https://bit.ly/3ERO0JJ.

40. *See* Baldridge, *supra* note 37.

41. *See* Michael A. Chichester, Jr. & Sophia Behnia, *Covid Is Accelerating the Gig Economy*, 18 TODAY'S GEN. COUNS. 1, 14–15 (May 2021), https://bit.ly/3kA13qV.

42. *See* Dynamex Operations West, Inc. v. Superior Ct., 416 P.3d 1, 5 (Cal. 2018). The court noted that an employee has the benefit of the employer paying social security, payroll tax, unemployment tax, state employment tax, and workers compensation insurance. *See id.* The employee also has wage and hour law protections and protection regarding working conditions. *See id.*

43. *See Dynamex*, 416 P.3d at 39 (adopting the ABC test rather than the *Borello* test). With the ABC test, a worker is not an independent contractor unless the worker is free from the company's control and direction as to how to perform the job, the job performed is outside the normal business activities of the employer, and the worker does the same sort of independent work for others that the worker does for the employer. *See id.*; *see also* S.G. Borello & Sons v. Dep't of Indus. Relations, 769 P.2d 399, 407 (Cal. 1989) (applying a test that is stricter regarding who is an employee).

California Assembly Bill 5 codified the ABC test. This Bill became law in 2019. California Proposition 22 carved out exceptions for some types of workers, creating a third classification for purposes of employment law that is somewhere between an employee and an independent contractor and thus has *some* of the worker rights of an employee. *See*

has been an active one on the federal level as well.[44] Thus, even for purposes of employment law, the parameters of employee status are not clear and are not well defined.

Another shift in recent years has occurred regarding the location of work for all workers involved in enterprises. In the past, nonemployees, be they employees of a third-party entity or individual nonemployees, may have worked physically in the bricks-and-mortar location of the host entity alongside entity employees. But even before the COVID-19 pandemic forced acceptance of and increased comfort with remote work, some corporate employees worked remotely,[45] as did nonemployees.[46] Whether a nonemployee works remotely has not been and certainly is not, going forward, a badge of employee or employee-like status. The combination of familiarity with remote work resulting from the COVID-19 pandemic as well as technological innovation may result in even more remote work arrangements involving entity employees and nonemployees alike.[47]

Sarah Jaffe, *The Battle for the Future of "Gig" Work*, VOX (May 18, 2021, 8:00 AM), https://bit.ly/2YadFw0; *see also* Chichester & Behnia, *supra* note 41.

44. A proposed federal rule that would result in fewer determinations that workers are independent contractors was proposed in January of 2021 but withdrawn in May of 2021. *See* Jim Paretti et al., *DOL Withdraws Independent Contractor Regulations, Meaning More Uncertainty for Employers*, LITTLER (May 14, 2021), https://bit.ly/38TL9RN.

45. *See* Chichester & Behnia, *supra* note 41, at 14–15 ("The benefits of using independent contractors have given rise to the burgeoning gig economy we see today. Technology and automation have made it easier for companies to connect directly with independent contractors and gig workers, and to ensure that workers fit the company's needs."); *see also* Alexandra Talty, *Work from Home 2019: The Top 100 Companies for Remote Jobs*, FORBES (Jan. 15, 2019, 8:00 AM), https://bit.ly/3z2gaxc (listing companies offering remote work pre-pandemic).

46. Sometimes remote work has involved work on different continents. *See* Jonathan Webb, *What is Offshoring? What is Outsourcing? Are They Different?*, FORBES (July 28, 2017, 7:05 PM), https://bit.ly/2Xf3NBh; Baldridge, *supra* note 37 ("The ultimate means to save a significant amount of money is to combine offshoring with outsourcing. That is move production to a third-party that is based in an overseas location. This has been an activity in which American corporations have been engaged for many decades.").

47. *See* Chichester & Behnia, *supra* note 41, at 14–15 ("As companies continue to rely on more remote workforces, they will inevitably outsource more flexible functions—information technology, accounting, software and web development, to name a few—to independent contractors."); Lori Ioannou, *1 in 4 Americans Will Be Working Remotely in 2021, Upwork Survey Reveals*, CNBC (Feb. 6, 2021, 12:32 PM), https://cnb.cx/3z02SBq (finding that employees will work remotely and employers will be more likely to turn to remote freelancers for skills that are not in-house); Kathryn Vesel, *The Pandemic Forced a Massive Remote-Work Experiment. Now Comes the Hard Part*, CNN BUSINESS (Mar. 11, 2021, 8:36 AM) https://cnn.it/3z1joRV (reporting that some companies will remain 100% remote post-pandemic; others with use a hybrid approach; others will have all employees in the office).

III. THE ATTORNEY-CLIENT PRIVILEGE

A. The Basics

The modern federal attorney-client privilege is largely a creature of common law,[48] although some tangential aspects of the privilege have become a part of the Federal Rules of Evidence.[49] Some states have codified the privilege[50] while some states continue to rely on the common law.[51] The federal system has a general statement regarding the privilege in Rule 501 of the Federal Rules of Evidence. Rule 501 states that "common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless" the Constitution, a federal statute, or Supreme Court Rule states otherwise.[52]

Even though the parameters of the privilege are derived from a variety of sources, the sources agree on the basic bounds of the privilege. The attorney-client privilege protects certain communications involving an attorney and that attorney's client. Communications protected by the privilege cannot be compelled regardless of need.[53] The privilege protects communications between attorneys and clients or their representatives,[54]

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48. There was an effort in the late 1960s and early 1970s to explicitly codify the definition of the privilege for purposes of federal law. The effort was unsuccessful. *See infra* Part III.B.2 (discussing the proposed rule). *See generally* 24 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5471 (Kenneth W. Graham, Jr. & Ann Murphy eds., 2021) (1986) (discussing the effort).

49. Rule 502 of the Federal Rules of Evidence became effective in 2008 and deals with various ancillary issues related to waiver in situations such as inadvertent disclosure of privileged communications. *See* FED. R. EVID. 502.

50. *See, e.g.*, CAL. EVID. CODE § 954; KRE 503; N.Y. C.P.L.R. 4503.

51. For example, an Indiana statute provides, in part:

> Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications:
> (1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.
> . . . .

IND. CODE § 34-46-3-1; *see also* Groth v. Pence, 67 N.E.3d 1104, 1118–19 (Ind. Ct. App. 2017) (discussing Indiana's privilege scheme).

52. FED. R. EVID. 501. Rule 501 was adopted in 1974 and also clarifies that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." *Id.*

53. *See* Guo Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 13 (D.D.C. 2021) ("After all, unlike the work-product privilege, which may be overcome by a sufficient showing of need, the attorney-client privilege is absolute."); *see also* Fenceroy v. Gelita USA, Inc., 908 N.W.2d 235, 242–43 (Iowa 2018) ("Our law recognizes that a 'confidential communication between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client.'" (quoting Shook v. City of Davenport, 497 N.W.2d 883, 886 (Iowa 1996), *abrogated on other grounds by* Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38, 48 (Iowa 2004))).

54. The communication can flow from attorney to client or from client to attorney. *See, e.g.*, O'Gorman v. Kitchen, 20-cv-1404(LJL), 2021 WL 1292907, at *2 (S.D.N.Y. Apr. 7, 2021) ("The privilege protects both the advice of the attorney to the client and the

in confidence, for the purpose of obtaining or receiving legal advice, and the communication cannot be in furtherance of a crime or fraud.[55] The privilege shields communications, not underlying facts that might be the subject of the communication.[56]

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information communicated by the client that provides a basis for giving advice."); Attorney General v. Facebook, Inc., 164 N.E.3d 873, 885 (Mass. 2021) ("[P]rivilege covers the flow of confidential communications in both directions—from the attorney to the client and from the client to the attorney.").

55. Many courts, especially federal courts, use the definition of the privilege set forth in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950). For example, the court in *EFCG, Inc. v. AEC Advisors, LLC*, 19-cv-8076 (RA)(BCM), 2020 WL 6378943, at *2 (S.D.N.Y. Oct. 30, 2020), noted that "[u]nder federal common law, . . . the elements of the attorney-client privilege are well-settled" and then quoted the *United Shoe* definition of the privilege. Judge Wyzanski, in *United Shoe*, defined the privilege as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United Shoe, 89 F. Supp. at 358–59.

The *Restatement (Third) of the Law Governing Lawyers* similarly provides:

> Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:
> (1) a communication
> (2) made between privileged persons
> (3) in confidence
> (4) for the purpose of obtaining or providing legal assistance for the client.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. L. INST. 2000); *see also In re* Vioxx Prods. Litig., 501 F. Supp. 2d 789, 795 (E.D. La. 2007) ("Five elements are common to all definitions of the attorney-client privilege: (1) an attorney, (2) a client, (3) a communication, (4) confidentiality anticipated and preserved, and (5) legal advice or assistance being the purpose of the communication.").

56. *See Upjohn Co. v. United States*, 449 U.S. 382, 395–96 (1981), in which the Supreme Court stated:

> The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

(quoting City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962); *see also* Attorney General v. Facebook, Inc., 164 N.E.3d 873, 886 (Mass. 2021) (suggesting that privilege protects communications but not the facts); Harris v. Hyundai Motor Mfg. Ala., LLC, Civil Action No. 2:19-CV-919-MHT, 2021 WL 1536577, at *4 (M.D. Ala. Apr. 19, 2021) (finding that facts are not protected and communications are protected).

The rationale of the privilege has several layers. The privilege enables clients to tell their lawyers everything about the matter—a "full and frank" disclosure.[57] Lawyers cannot render the best advice to their clients without all the relevant information.[58] The information disclosed by clients allows lawyers to render the best possible advice to the clients. An additional layer of rationale is that, as the Supreme Court in *Upjohn Company v. United States* explained, this fully-informed legal advice is necessary to "promote broader public interests in the observance of law and the administration of justice."[59] The *Upjohn* Court also noted that "[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[60] Full disclosure of the client's situation "better enable[s] the client to conform his conduct to the requirements of the law and to present legitimate claims or defenses when litigation arises."[61]

Without doubt, in particular situations, the privilege impedes the truth-finding process.[62] However, the collective legal wisdom over the centuries has concluded that the benefit of the privilege outweighs the cost to truth-finding on a meta level. As the Massachusetts court in *Attorney General v. Facebook, Inc.*[63] stated: "We have emphasized the value of

57. *Upjohn*, 449 U.S. at 389 (explaining that the "purpose is to encourage full and frank communication between attorneys and their clients").

58. This is a long-held rationale. In *Annesley v. Anglesea*, 17 How. St. Tr. 1139, 1237 (1743), an English court stated:

> No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose every thing that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him.

See also Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. Rev. 1061, 1063 n.6 (1978) (discussing the *Annesley* case). For a more modern statement of this aspect of the privilege rationale, see Trammell v. United States, 445 U.S. 40, 51 (1980) ("[T]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

59. *Upjohn*, 449 U.S. at 389; *accord In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 360–61 (3d Cir. 2007) (as amended on Oct. 12, 2007); *see also Facebook*, 164 N.E.3d at 885 (quoting Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1194 (Mass. 2009)).

60. *Upjohn*, 449 U.S. at 389; *see also* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) ("[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice.").

61. United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997) (citing *Upjohn*, 449 U.S. at 389–90).

62. *See* United States v. Nixon, 418 U.S. 683, 710 (1974) (suggesting that privilege is in "derogation of the search for truth"); *see also* 10x Genomics, Inc. v. Celsee, Inc., 505 F. Supp. 3d 334, 337 (D. Del. 2020) (noting that privilege obstructs the search for truth).

63. 164 N.E.3d 873 (Mass. 2021).

protecting confidential attorney-client communications, as the 'social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweigh[s] the harm that may come from the suppression of the evidence.'"[64] Another strong statement is in *Rhone-Poulenc Rorer Inc. v. Home Indemnity Company*,[65] in which the United States Court of Appeals for the Third Circuit stated, "The privilege encourages the client to reveal to the lawyer confidences necessary for the lawyer to provide advice and representation. As the privilege serves the interests of justice, it is worthy of maximum legal protection."[66]

Even so, courts are wary of the effect of the privilege on the development of the truth in particular cases. A common refrain in court opinions is that, because of this effect on truth-finding, the privilege should be construed narrowly.[67]

B. The Privilege for Entity Clients before Upjohn

1. The Courts

Courts have long applied the attorney-client privilege to entity clients.[68] The difficulty, historically, has been who, for purposes of the privilege, is a representative of the entity client in the communication with the attorney. Some courts, before and at the time of the *Upjohn* case, applied the corporation's attorney-client privilege, assuming all the other requirements were satisfied, only when the communication involved a

64. *Id.* at 885–86 (quoting Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 870 N.E.2d 1105, 1111 (Mass. 2007)); *see also* Matter of *In re* Grand Jury Investigation, 772 N.E.2d 9, 17 (Mass. 2002) ("Considerable public benefit inures when an institution voluntarily scrutinizes its own operations for the purpose of seeking advice from counsel on how to comply with the law, particularly where today's increasingly dense regulatory terrain makes such compliance 'hardly an instinctive matter.'" (quoting *Upjohn*, 449 U.S. at 392)).

65. 32 F.3d 851 (3d Cir. 1994).

66. *Id.* at 862 (citing *Upjohn*, 449 U.S. at 389; Haines v. Liggett Grp. Inc., 975 F.2d 81, 90 (3d Cir. 1992) (as amended on Sept. 17, 1992)); *see also* Rasby v. Pillen, 8:15-CV-226, 2016 WL 4995036, at *3 (D. Neb. Sept. 19, 2016) (quoting *Rhone-Poulenc Rorer*, 32 F.3d at 862); Nemirofsky v. Seok Ki Kim, 523 F. Supp. 2d 998, 1001 (N.D. Cal. 2007) (as amended on Nov. 24, 2007) (quoting *Rhone-Poulenc Rorer*, 32 F.3d at 862).

67. *See, e.g.*, Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just., No. CV 19-1552 (ABJ), 2021 WL 2652852, at * 7 (D.D.C. May 3, 2021) (explaining that attorney-client privilege is "'narrowly construed'" and "'limited to those situations in which its purposes will be served'") (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980)); *see also* Diamond Resorts U.S. Collection Dev. v. US Consumer Att'ys, P.A., 519 F. Supp. 3d 1184, 1197 (S.D. Fla. 2021) (suggesting to construe the privilege narrowly "so as not to exceed the means necessary to support the policy which it promotes") (citing Fisher v. United States, 425 U.S. 391, 403 (1976)).

68. *See, e.g.*, United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. b (AM. L. INST. 2000) ("Extending the privilege to corporations and other organizations was formerly a matter of doubt but is no longer questioned.").

member of the corporation's control group.[69] Members of the control group were generally high-level management employees—employees who controlled the corporate response to legal advice.[70] With the control group approach, the individual's authority to act for the corporation was vital and such authority usually resided with employees at the top of the entity hierarchy.[71] For example, the court in *City of Philadelphia v. Westinghouse Electric Corp.*,[72] stated:

> [T]he most satisfactory solution, . . . , is that if the employee making the communication, of whatever rank he may be, 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, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.[73]

Other courts working before the Supreme Court's *Upjohn* opinion adopted a broader view of who could be a representative of the entity client for purposes of the entity's privilege.[74] For example, in *Harper & Row Publishers, Inc. v. Decker*,[75] the United States Court of Appeals for the Seventh Circuit looked to whether the purpose of the communication was for the corporation to gain legal advice from the attorney, whether a higher-ranking employee instructed the communicating employee to speak with the lawyer to assist the corporation in gaining legal advice from the lawyer, and whether the subject matter of the communication between the entity lawyer and the employee related to the subject matter of the

69. *See, e.g.*, City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962) (reasoning that the corporation's attorney-client privilege can apply to a communication between the corporation's attorney and an employee in a position to act upon the legal advice).

70. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (AM. L. INST. 2000) (defining the control group).

71. For a discussion of the control group approach with a pre-*Upjohn* view, see Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970). For a more retrospective view, see RICE, *supra* note 17, at §§ 4:12–13; John W. Gergacz, *The Attorney-Corporate Client Privilege*, 37 A.B.A. 461, 466–67 (2021); *see also* Jason Batts, *Rethinking Attorney-Client Privilege*, 33 GEO. J. LEGAL ETHICS 1, 24–25 (2020).

72. 210 F. Supp. 483 (E.D. Pa. 1962).

73. *Id.* at 485.

74. *See, e.g.*, Harper & Row Pub., Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977).

75. 423 F.2d 487 (7th Cir. 1970). The opinion was affirmed by an equally divided Supreme Court without an opinion. *See* Decker v. Harper & Row Publishers, Inc., 400 U.S. 348, 349 (1971).

employee's responsibilities for the corporation.[76] This approach was called a subject-matter approach.[77]

2. The Proposed Federal Rule of Evidence Defining the Privilege Generally and the Entity Privilege in Particular

In the late 1960s, some elements of the bar sought to codify the attorney-client privilege for purposes of federal law. While the effort was unsuccessful regarding a rule defining the parameters of the privilege,[78] the effort is nonetheless interesting with regard to the proposed treatment of the question at hand—identifying who can speak with an entity's attorney as a representative of the entity client for purposes of the privilege, and, assuming all other requirements of the privilege are satisfied, have the entity's attorney-client privilege protect the communication.

The initial proposed rule in 1969 defined the term, "representative of the client," as follows: "A 'representative of the client' is one having authority to obtain professional legal services, or to act on advice rendered thereto, on behalf of the client."[79] This definition was revised for a later version of the proposed rule by changing the "or" to an "and" so that the definition aligned more closely with the control group approach. The revised definition of the term, "representative of the client," was then as follows: "A 'representative of the client' is one having authority to obtain professional legal services, *and* to act on advice rendered thereto, on behalf of the client."[80] The general statement of the rule provided that a communication between the entity's lawyer and the entity's "representative" that otherwise satisfied the requirements of the privilege was protected by the entity's privilege.[81]

The final proposed version of the rule presented to the Supreme Court omitted any definition of "representative of the client."[82] The Advisory

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76. *See Harper & Row*, 423 F.2d at 491–92.

77. *See* RICE, *supra* note 17, at § 4:14; Gergacz, *supra* note 71, at § 3:71; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWS. § 73 cmt. d (AM. L. INST. 2000) (describing the subject matter approach).

78. *See* WRIGHT & MILLER, *supra* note 49, at §§ 5321, 5471 (discussing the statutory history of Rule 503).

79. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 503(a)(3), 46 F.R.D. 77, 78 (proposed Mar. 31, 1969).

80. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, Rule 503(a)(3), 51 F.R.D. 315, 361 (proposed 1971) (emphasis added); *see also* WRIGHT & MILLER, *supra* note 48, at § 5483.

81. *See id.* at 47–48; Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 5-03(a)(3), 51 F.R.D. 315, 363 (proposed 1971).

82. Rules of Evidence for the United States Courts and Magistrates, Rule 503, 56 F.R.D. 183, 235–237 (1973).

Committee stated that "the matter is best left to resolution by decision on a case-by-case basis."[83] The Supreme Court approved this version of what has become known as Rule 503,[84] but Congress ultimately rejected the proposed Rule 503 entirely, perhaps as a result of the issue of the proper parameters of the privilege as applied to corporations and other entities.[85] Rule 501 survived and simply refers back to the common law for the privilege parameters.[86]

IV. THE *UPJOHN* CASE: THE SUPREME COURT ADDRESSES WHO CAN BE A REPRESENTATIVE OF AN ENTITY CLIENT

A. The Lower Courts in the Upjohn *Matter*

Upjohn Corporation learned, in the process of a tax audit, that employees of a foreign subsidiary had bribed foreign officials to secure business. Such bribes were, of course, illegal.[87] Upjohn's General Counsel, after consultation with the Chairman of the Board of Directors and outside counsel, began an internal investigation.[88] The Chairman sent a letter to "[a]ll Foreign General and Area Managers" that contained a questionnaire about the "possibly illegal" payments and stated that the Chairman had asked Upjohn's General Counsel to investigate the matter.[89] The letter stated that everyone should treat the investigation as confidential and that responses should be sent to the General Counsel. The General Counsel and outside counsel interviewed the group who received the Chairman's letter and thirty-three others.[90]

After Upjohn submitted information to the Securities and Exchange Commission and the Internal Revenue Service about the internal investigation, the Internal Revenue Service sought access to the questionnaires, memos, and notes relating to the interviews.[91] Upjohn

83. Rules of Evidence for the United States Courts and Magistrates, Advisory Committee's Notes, 56 F.R.D. 183, 237 (1973).

84. *See* Rules of Evidence for the United States Courts and Magistrates, Rule 503, 56 F.R.D. 183, 183 (1973).

85. *See* WRIGHT & MILLER, *supra* note 48, at § 5483.

86. *See* FED. R. EVID. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court."); *see also* FED. R. EVID. 502. Rule 502 was created much later and deals with tangential issues such as inadvertent disclosure.

87. *See* Upjohn Co. v. United States, 449 U.S. 383, 386 (1981).

88. *See id.*

89. *Id.* at 386–87.

90. *See id.* at 387.

91. *See id.* at 387–88.

refused.[92] The district court held that Upjohn had to disclose the requested information because Upjohn had waived any applicable privilege.[93]

On appeal, the United States Court of Appeals for the Sixth Circuit rejected the lower court's conclusion that Upjohn had waived the privilege.[94] Expressing concern that the reach of the privilege cannot be too broad,[95] the court then applied the control group test and held that Upjohn had no privilege regarding the requested questionnaires, memos, and notes to "the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'"[96] In the view of the Sixth Circuit, "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole."[97] Because the investigation included interviews with the Chairman and the President and other high-ranking corporate actors, the court remanded for a determination of who might be within the control group since communications between the attorney for the corporation and those individuals could be protected by Upjohn's privilege because those individuals were likely members of the control group.[98]

B. The Supreme Court's Upjohn *Opinion: A Functional Approach for Employees*

The Supreme Court in *Upjohn* made clear that the application of the attorney-client privilege to situations in which the attorney represents a corporation and communicates with individuals in an effort to provide legal advice to that entity client cannot be boiled down to "a broad rule or series of rules to govern all conceivable future questions in this area."[99] Rather, in the Court's view, a court must apply the privilege, as Federal Rule of Evidence 501 states, "by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."[100]

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92. *See id.* at 388.

93. *See* United States v. Upjohn Co., No. K77-7 Misc. CA-4, 1978 WL 1163, at *9 (W.D. Mich. Feb. 23, 1978) ("[T]he Company should be deemed to have waived the attorney-client privilege with respect to the same matter, if indeed it ever existed."), *report and recommendation adopted by* 1978 WL 1221 (W.D. Mich. Apr. 29, 1978).

94. United States v. Upjohn Co., 600 F.2d 1223, 1227 n.12 (6th Cir. 1979).

95. *See id.* at 1227.

96. *Id.* at 1225.

97. *Id.* at 1226.

98. *See id.* at 1227–28.

99. Upjohn Co. v. United States, 449 U.S. 383, 386 (1981).

100. *Id.* at 389 (quoting FED. R. EVID. 501).

Addressing the rationale and purpose of the privilege, the Court stated:

> Its purpose 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 privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[101]

The Court rejected the control group approach, noting that such an approach is too narrow because it "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[102] In the Court's view, gathering the facts relevant to a legal problem is the necessary first step in rendering legal advice.[103] Because lower-level employees may have information the corporation's attorney needs and yet those employees are not members of the control group, the control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[104] The Court stated, "[t]he narrow 'control group test' . . . in this case cannot, consistent with 'the principles of the common law as . . . interpreted . . . in the light of reason and experience,' . . . govern the development of the law in this area."[105]

The Court concluded that Upjohn's privilege applied to the communications between Upjohn's lawyers and the employees who had the relevant information about the bribes that the lawyers needed to advise Upjohn, regardless of the rank of those employees.[106] In the Court's view, this application was "[c]onsistent with the underlying purposes of the attorney-client privilege."[107]

The *Upjohn* Court reached this result after focusing on several specific issues. First, the Court noted that the Upjohn employees communicated with Upjohn's counsel so that Upjohn could obtain needed advice from the lawyer. Second, higher-ranking actors within Upjohn directed the employees to talk with Upjohn's lawyer for the purpose of legal advice for Upjohn. Third, the employees understood that they were speaking with the Upjohn lawyer so that the corporation could obtain

101. *Id.*
102. *Id.* at 390.
103. *See id.* at 390–91.
104. *Id.* at 392.
105. *Id.* at 397 (quoting FED. R. EVID. 501.).
106. *See id.* at 395.
107. *Id.*

needed legal advice. Fourth, higher-ranking Upjohn employees did not have the information that the lawyer needed. Fifth, the communicating employees talked with Upjohn's lawyer about matters that were within the purview of the employees' job responsibilities. Finally, the employees were told that the communications and everything surrounding the investigation was confidential and everyone heeded that instruction.[108]

Interestingly, the Court did not expressly discuss agency and its requirements as a free-standing doctrine and never in its own analysis stated that the representative of the client must be an agent. The Court mentioned agency only twice. The Court once quoted the lower court's pronouncement that the entity's "officers and agents" who were not control group members could not be within the entity privilege[109] and once quoted the lower court's pronouncement that the entity's "officers and agents" who were members of the control group could be within the entity's privilege.[110] A rational interpretation of this lack of discussion of agency is that the *Upjohn* opinion was designed to free the privilege analysis from dependence on agency concepts unrelated to privilege goals and to substitute a more nuanced functional analysis.

The Court opined that determinations regarding the reach of the entity privilege—which employees can be representatives of the entity and which of these employees' communications with the entity's lawyer are protected—must, to be consistent with the words of Rule 501, be a "'recognition of a privilege based on a confidential relationship . . . on a case-by-case basis.'"[111] The Court acknowledged that such an approach "may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege," but noted that "it obeys the spirit of the Rules."[112]

Justice Burger concurred in part and concurred in the judgment.[113] He agreed that the control group approach was too narrow for determining the reach of the entity privilege.[114] Justice Burger argued, however, that the majority should have set forth a general rule to guide the courts that would apply to employees *and* former employees rather than simply discussing factors to consider.[115]

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108. *See* Upjohn Co. v. United States, 449 U.S. 383, 394–95 (1981).

109. *Id.* at 388.

110. *Id.* at 391.

111. *Id.* (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

112. *Id.* at 396–97.

113. *See id.* at 402 (Burger, J., concurring).

114. *See id.* (Burger, J., concurring) ("I agree fully with the Court's rejection of the so-called 'control group' test . . . .").

115. *See id.* at 402–03 (Burger, J., concurring) ("[T]he 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.").

C. *The Unresolved Issue: Former Employees and Other Nonemployees*

The Supreme Court's *Upjohn* opinion clarified the analysis for determining which employees can be representatives of the entity client such that the entity's privilege can protect communications involving those employees and entity lawyer. The analysis must be a case-by case factor analysis and must focus on underlying rationale for the privilege while considering the factors discussed in the opinion and perhaps other factors as well. The Supreme Court's opinion left unresolved whether an entity's privilege can protect communications between the entity's counsel and nonemployees of all sorts, including the special case of former employees—individuals who were employees when they gained the vital information but who are former employees by the time they communicate with the entity's counsel.

The question of nonemployees was not before the *Upjohn* Court. The situation involved communications with former employees in that seven of the eighty-six employees interviewed by Upjohn's counsel had ended their employment relationship with Upjohn but did not involve nonemployees who had never been employees.[116] With regard to the former employees, the Court refused to opine on the matter because the lower courts had not addressed the issue.[117] In the Court's view, this was a question to be dealt with on remand.[118] Justice Burger was inclined to include the former employees with the analysis the majority set out for employees if a superior directed the former employees to speak with the entity's counsel.[119]

V. FORMER EMPLOYEES

A. *Many Courts Apply an Entity's Privilege to Communications Involving Former Employees*

Many courts have applied an entity's attorney-client privilege to communications between the entity's counsel and an individual who had been an employee but, at the time of the communication, was no longer an employee of the entity. Courts have done so when the former employee was communicating with the entity's attorney about information the

116. *See id.* at 394 n.3.

117. *See id.*

118. *See id.* at 397 n.6.

119. *See id.* at 402–03 (Burger, J., concurring) ("Because of the great importance of the issue, in 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.").

individual obtained during the employment.[120] These courts have not focused on a litmus test of employee status at the time of the communication. Rather, the courts recognize the significance of the relationship between the entity and the individual that resulted from the fact that the individual had at one time been an employee and the fact that the former employee has the information needed by counsel for the corporation. Applying the corporation's privilege to protect such communications is consistent with the rationale of the privilege.

For example, in *Peralta v. Cendant Corporation*,[121] Cendant was sued for employment discrimination. The lawyer for Cendant communicated with a former employee who had been the plaintiff's supervisor at Cendant.[122] When the plaintiff's lawyer later sought information about those conversations, the court determined that Cendant's attorney-client privilege applied to protect Cendant's lawyer's communications with the former employee that concerned "the former employee's conduct and knowledge, or communication with [the organization's] counsel, during his or her employment[.]"[123]

B. Some Courts Refuse to Apply an Entity's Privilege to Communications Involving Former Employees

A few courts have not been willing to apply the entity's privilege to communications between the entity's counsel and former employees.[124] In

120. *See, e.g.*, *In re* Allen, 106 F.3d 582, 606 (4th Cir. 1997) (following *Upjohn*'s analysis to apply the corporation's privilege to former employee); United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996) (applying the corporation's privilege to former employees); Export-Import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005) ("Virtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment."); Peralta v. Cendant Corp., 190 F.R.D. 38, 41 (D. Conn. 1999) (applying the corporation's privilege to former employee); *see also* Richmond, *supra* note 17, at 54–55; RICE, *supra* note 17, at § 4:18 (discussing former employees).

121. 190 F.R.D. 38 (D. Conn. 1999).

122. *See id.* at 39.

123. *Id.* at 41. For a court following the *Peralta* approach, see Jacobs v. Alam, No. 15-10516, 2020 WL 3064435, *6–7 (E.D. Mich. June 9, 2020) (reasoning that an entity's privilege protects communications between the entity's lawyer and a former employee of entity).

124. *See, e.g.*, Newman v. Highland School Dist. No. 203, 381 P.3d 1188, 1194 (Wash. 2016) (en banc) (rejecting privilege application to former employees); Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303, 306 (E.D. Mich. 2000) (rejecting application of privilege generally but noting that there could be a rare circumstance in which the corporation's attorney-client privilege should apply). In *Infosystems*, the court noted that the corporation's privilege generally should not reach communications between the corporation's counsel and former employees. Yet, the *Infosystems* court stated that:

> 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

Newman v. Highland School District No. 203,[125] the Washington Supreme Court refused to apply the entity school district's attorney-client privilege to communications between the entity's counsel and former employees even when the former employees talked with the attorney to provide the attorney with the information the attorney needed for the attorney to represent the school board.

In *Newman*, a high school quarterback, having suffered a permanent brain injury, sued the school district claiming that coaches allowed him to play even though he exhibited concussion symptoms.[126] The lawyer for the school district interviewed the coaches employed by the school district at the time of the incident, some of whom were no longer employees of the school district at the time of the communications.[127] When the plaintiff's attorney sought access to those communications, the school district claimed that the entity's privilege protected those communications.[128] The *Newman* court "decline[d] to expand the privilege to communications outside the employer-employee relationship because former employees categorically differ from current employees with respect to the concerns identified in *Upjohn* and *Youngs*."[129] The *Newman* court required employee status at the time of the communication because the "flexible approach articulated in *Upjohn* presupposed attorney-client communications taking place within the corporate employment relationship."[130] As noted by the *Newman* dissent,[131] this statement by the *Newman* majority is suspect given that the *Upjohn* court specifically noted

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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.

Id. at 305–06.

The *Restatement (Third) of the Law Governing Lawyers*, in Section 73, comment e, notes that generally the entity's privilege does not apply to communications involving former employees because they are no longer agents of the organization at the time of the communication but that such communications may be privileged if the contract between the individual and the entity provides that the individual must give information to the corporation's lawyer even after the end of the employment. *See* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 73 cmt. e (AM. L. INST. 2000).

125. 381 P.3d 1188 (Wash. 2016) (en banc).

126. *See id.* at 1189–90.

127. *See id.* at 1190.

128. *See id.*

129. *Id.* at 1192 (citing Upjohn Co. v. United States, 449 U.S. 383 (1981); Youngs v. PeaceHealth, 316 P.3d 1035 (Wash. 2014)).

130. *Id.*

131. The dissent takes issue with the idea that the *Upjohn* opinion presupposes employee status, noting that the *Upjohn* court specifically refused to decide whether the privilege applied to former employees. *See Newman*, 381 P.3d at 1196.

that it was not deciding the question of privilege coverage regarding former employees.[132]

In the *Newman* court's view, because there is no "ongoing obligation between the former employee and employer that gives rise to a principal-agent relationship, a former employee is no different from other third-party fact witnesses to a lawsuit . . . ."[133] Acknowledging that former employees may have information important to the entity's attorney in representing the entity, and acknowledging that former employees' conduct while employed could have created situations for which the entity can be liable, the court stated that these concerns "do not justify expanding the attorney-client privilege beyond its purpose."[134] The *Newman* court then defined the privilege's purpose as "foster[ing] full and frank communications between counsel and the client (i.e., the corporation), not its former employees."[135] In the *Newman* court's view, the entity's privilege could reach and cover communications between the entity's attorney and "constituents and agents,"[136] but not, generally, former employees, because former employees are not employees at the time of the communication and thus are not agents of the entity at the time of the communication—and presumably not constituents. In so holding, the *Newman* court stated that it "preserve[d] a predictable legal framework."[137]

VI. NONEMPLOYEES AND AGENCY AND THE RESTATEMENTS

When the question of the reach of the entity privilege relates to communications involving the entity's lawyer and a nonemployee who is involved with the entity but who has never been an entity employee, the *Restatement (Third) of the Law Governing Lawyers* takes the position that, generally, only agents of the entity corporation can be representatives of a corporate client for the purpose of the corporation's attorney-client privilege.[138] The *Restatement* measures that agency at the time of the communication with the entity's lawyer.[139] Comment e to section 73 of the *Restatement* states, in part:

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132. *See Upjohn*, 449 U.S. at 394; *see also supra* Part IV.C (discussing the fact that the *Upjohn* majority expressly did not decide privilege application regarding former employees).

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

134. *Id.*

135. *Id.* (citing State v. Chervenell, 662 P.2d 836 (Wash. 1983)).

136. *Id.* at 1192.

137. *Id.* at 1193.

138. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (AM. L. INST. 2000) (stating that a communication must be between a privileged person and "an agent of the organization").

139. *See id.* at § 73 cmt. e.

> [A] person making a privileged communication to a lawyer for an organization must then be acting as agent of the principal-organization. The objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer . . . Generally, that premise implies that persons be agents of the organization at the time of communicating. The privilege may also extend, however, to communications with a person with whom the organization has terminated, for most other purposes, an agency relationship. A former agent is a privileged person under Subsection (2) if, at the time of communicating, the former agent has a continuing legal obligation to the principal-organization to furnish the information to the organization's lawyer. The scope of such a continuing obligation is determined by the law of agency and the terms of the employment contract . . . .[140]

Thus, the entity's privilege generally does not apply to communications involving former employees because they are no longer agents of the organization at the time of the communication. Such communications may be privileged if the contract between the individual and the entity provides that the individual must give information to the entity's lawyer even after the end of the employment. Referencing traditional agency principles, the *Restatement (Third) of the Law Governing Lawyers* explains that officers and employees are agents for various purposes, that directors may be agents if they are communicating in the interest of and for the benefit of the corporation, and that independent contractors can be agents as well.[141]

But what, exactly, is an agency relationship? How does one determine who is an agent of a principal and for which purposes? The *Restatement (Third) of Agency* defines "agency" as follows:

> Agency is the fiduciary relationship that arises when one person (a "Principal") manifests assent to another Person (an "Agent") that the Agent shall act on the Principal's behalf and subject to the Principal's control, and the Agent manifests assent or otherwise consents so to act.[142]

The "control" concept, explains the *Restatement (Third) of Agency,* encompasses situations that do not involve physical control. Control exists if the principal has the right to give the putative agent direction, to assess the putative agent's performance, and to terminate the relationship with the putative agent.[143] The *Restatement (Third) of Agency* provides more background for understanding:

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140. *Id.*
141. *See id.* at § 73 cmt. d.
142. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).
143. *See id.* at § 1.01 cmt. f.

> The term "agency" has several distinct meanings. The common law definition of a relationship of agency uses concepts, such as "manifestation" and "control," that embrace a wide spectrum of meanings and that in this application are highly fact-specific. As a result, agency law covers a broader set of relationships than might be expected. Manifestations may be made indirectly and in generalized ways, and legal implications do not necessarily depend on precise statements made to specifically identified individuals. Likewise, a principal's right of control, which entitles the principal to give interim instructions or directions to the agent, is a broadly drawn concept.[144]

Regarding the control aspect, the *Restatement (Third) of Agency* states:

> Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established. Within an organization the right to control its agents is essential to the organization's ability to function, regardless of its size, structure, or degree of hierarchy or complexity . . . . A principal may exercise influence over an agent's actions in other ways as well. Incentive structures that reward the agent for achieving results affect the agent's actions. In an organization, assigning a specified function with a functionally descriptive title to a person tends to control activity because it manifests what types of activity are approved by the principal to all who know of the function and title, including their holder.[145]

Thus, in very many situations involving nonemployees who have vital information about the entity and who have sustained working relationships with the entity—members of the corporate team, insiders, nonemployees whose role is such that a court would recognize a significant relationship between the nonemployee and the entity—those individuals are also agents of the entity for certain purposes.

For example, assume Alpha Corporation has contracted with Staffing Corporation so that Staffing Corp. supplies Alpha with four information technology specialists who are Staffing employees. The contract term is two years. The contract has been renewed several times. Specialist Bonnie has worked on Alpha matters in Alpha's corporate headquarters for years. After a cybersecurity incident, Alpha's attorney communicated with Bonnie for the sole purpose of gaining information that only Bonnie had about the incident. Nonemployee Bonnie is likely an agent of Alpha, the entity, for some purposes. Bonnie can thus be a representative of the

144. RESTATEMENT (THIRD) OF AGENCY intro. note (AM. L. INST. 2006).
145. *Id.* at § 1.01 cmt. f.

corporate client for purposes of the privilege even under the *Restatement* requirement that the representative be an agent of the entity. In fact, courts generally have not gone so far as to rigorously address the agency issue.

VII. THE FUNCTIONAL EQUIVALENT ANALYSIS AS APPLIED

In situations involving nonemployees, some courts do not address the agency issue but rather discuss whether they should adopt the "functional equivalent test" to determine whether nonemployees can be protected by an entity's privilege.[146] Some courts have refused to use a functional equivalent analysis, viewing such a move as an expansion of *Upjohn*.[147] If these courts are deciding that nonemployees categorically cannot be representatives of the entity client for purposes of the entity's privilege, then these courts are contradicting the historically generally accepted principle that a nonemployee can be an agent of an entity principle and thus a representative of the client for purposes of the privilege.

Some courts have been willing to consider the idea that a nonemployee can be a representative of the entity client for purposes of the privilege and have applied the functional equivalent concept to identify nonemployees whose communications with entity counsel can be protected by the entity's privilege.[148] Unfortunately, many of these courts have formulated functional equivalence analyses that focus on whether the nonemployee is the functional equivalent of an employee without regard to the effect the court's definition has on the purposes of the privilege.[149]

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146. *See, e.g.*, Glob. Textile All., Inc. v. TDI Worldwide, LLC, 847 S.E.2d 30, 35 (N.C. 2020). The *Global Textile* court did not define agency or apply agency concepts expressly but concluded that there was no agency relationship:

> Yet, even if these specialized attorney-client privilege applications were recognized under North Carolina law, the Business Court did not abuse its discretion by determining that these specialized applications do not apply in this case. Under the functional-equivalent test, an individual is the functional equivalent of a company's employee when his communications with counsel "fell within the scope of his duties" for the company. *In re Bieter Co.*, 16 F.3d at 940. This specialized application does not apply because Haspeslagh lacks any sort of agency relationship with GTA and thus cannot have "duties" at GTA.

Id. at 35.

147. *See, e.g.*, *In re* Dealer Mgmt. Sys. Antitrust Litig., 335 F.R.D. 510, 518 (N.D. Ill. 2020) (declining to adopt the "functional equivalent test" and stating that even if it adopted the analysis the nonemployee was not a functional equivalent).

148. *See* United States v. Graf, 610 F.3d 1148, 1158 (9th Cir. 2010); *In re* Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994); *see, e.g.*, Berisha v. Lawson, 973 F.3d 1304, 1318 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2424 (2021) (mem.) (holding that a nonemployee's communications with the corporation's attorney are protected by the corporation's attorney-client privilege).

149. *See, e.g.*, Frank v. Morgans Hotel Grp. Mgmt. LLC, 116 N.Y.S.3d 889, 892 (N.Y. Sup. Ct. 2020) ("[W]hether a consultant or other contractor has in practice 'assum[ed] the functions and duties of [a] full-time employee' and has been 'so thoroughly integrated' into the corporation's structure that he or she 'is a de facto employee of the

The focus of these courts is whether the nonemployee is the functional equivalent of an employee, not whether the nonemployee's *relationship* with the entity is of the same significance of involvement as an employee. In addition, some courts, in determining nonemployees who are functional equivalents, apply narrow requirements so that the test is not determining a functional equivalent of an employee, but rather a small set of employees.[150]

The result of some of these approaches is that privilege protection does not apply to a nonemployee who has all the characteristics that would allow an employee's communications with the entity lawyer to be privileged. Such a nonemployee might be embedded in a company for years, might work as a member of the entity team, might be responsible for tasks directed by the entity, and might have important information the entity's counsel needs to advise the entity. Yet, no privilege applies because that nonemployee is not the functional equivalent of an employee or a particular type of employee. A rigorous agency analysis, however, likely would determine that such a nonemployee is an agent of the corporation for purposes of the entity privilege. In the era of the *Upjohn* opinion, an entity employee may have had that role. Under the teachings of *Upjohn*, the communications between entity's counsel and that employee would have been protected by the entity's privilege. Yet, some courts of today would deny that such a nonemployee can be a representative of the client—that the entity's privilege could protect communications involving the entity's counsel and that nonemployee.

A. The Origin of the Functional Equivalent Analysis: In re Bieter Company

The birth of the functional equivalent doctrine vis-à-vis nonemployees traces to In re *Bieter Company*,[151] a case decided in 1994 by the United States Court of Appeals for the Eighth Circuit. In *Bieter*, an individual who was not an employee of the company was intimately involved in the real estate development project that was the reason for the

company.'" (quoting Export-Import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 S.D.N.Y. 2005)); People v. McQueen, No. 451825/2019, 2020 WL 1878107, at *3 (N.Y. Sup. Ct. Feb. 21, 2020) ("[T]he third-party must assume the functions and duties of a full-time employee."); *see also infra* Part VII.B (discussing this approach).

150. *See, e.g.*, Export-Import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (referring to a "key corporate job"); *see infra* Part VII.B (discussing the *Export-Import Bank* approach).

151. 16 F.3d 929 (8th Cir. 1994). As noted in the *Bieter* opinion, McCaugherty v. Sifferman, 123 F.R.D. 234, 239 (N.D. Cal. 1990), preceded *Bieter* and found that several consultants were "functional equivalents of employees." *Bieter*, 16 F.3d at 929. Yet, later courts look to *Bieter*, not *McCaugherty*, as the influential opinion regarding the doctrine. *See, e.g.*, *Berisha*, 973 F.3d at 1318 (referring to the *Bieter* opinion, the court stated that other courts have been "[l]ed by the Eighth Circuit").

company's existence. When litigation related to the project occurred, the nonemployee was intimately involved in the litigation as well. No contract defined the terms of the nonemployee's involvement for a part of the relevant time, but a contract that covered a year of the time stated that the nonemployee was not an "agent, employee, or partner" of the company.[152]

In evaluating whether the company's attorney-client privilege protected communications between the nonemployee and the company's lawyers, the court noted that the circuit had adopted a type of subject matter test to determine whether an employee's communications with the employer's lawyer would be covered by the entity's privilege.[153] According to that test, the entity's privilege applied to an employee's communications with counsel for the entity if:

> (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[154]

In shifting to the situation of a nonemployee, the *Bieter* court identified two issues. First, was the nonemployee a representative of the company because he had a relationship with the company "of the sort that justifies application of the privilege[?]"[155] Second, are the elements of the test for employees satisfied?[156] In effect, if the nonemployee had a relationship sufficient to be a representative of the client, then the court should treat the nonemployee as it would treat an employee of the company. The *Bieter* court stated that "'at times there will be potential information-givers who are not employees of the corporation but who are nonetheless meaningfully associated with the corporation in a way that makes it appropriate to consider them "insiders" for purposes of the privilege.'"[157]

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152. *See Bieter*, 16 F.3d at 933–34.

153. *See id.* at 936.

154. *Id.* (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977)).

155. *Id.* at 938.

156. *Id.*

157. *Id.* at 936 (quoting Sexton, *supra* note 1, at 498). The *Bieter* court also relied on *McCaugherty* in which the court applied an entity's privilege to communications between the entity's lawyers and two "independent consultants." *See id.*; *see also McCaugherty*, 132 F.R.D. at 239.

The *Bieter* court concluded that the nonemployee, referred to by the court as an "independent consultant,"[158] was "in all relevant respects the functional equivalent of an employee."[159] The court reasoned that the nonemployee was involved on a daily basis with the company and had worked on the company's behalf on the project that led to the litigation, often dealing with third parties as the representative of the company. The nonemployee likely had information about the subject of the litigation and the company that no one else possessed.[160]

The *Bieter* court did not expressly declare that the nonemployee was an agent of the company for privilege purposes. In addition, the court never stated that it agreed with the proclamation in the contract involving the entity and the nonemployee that the nonemployee was not an agent of the company when privilege was the issue. Rather, without wading into agency analysis, the court declared that the nonemployee's relationship with the company was "of the sort that justifies application of the privilege," and the court should thus recognize the nonemployee as a representative of the entity client for purposes of the privilege.[161] The *Bieter* court concluded that the test for an employee being a representative of the entity was satisfied as well.[162] Just as the *Upjohn* opinion set out no list of required elements for employees to be representatives of the entity for purposes of the privilege, so too the *Bieter* court did not state particular facts that must be present for the nonemployee to be a functional equivalent of an employee.

B. Flawed Functional Equivalent Analysis

Since *Bieter*, other courts have struggled, while citing *Bieter* and claiming to follow its lead, in deciding which nonemployees can be representatives of an entity for purposes of the entity's attorney-client privilege. These courts have created a variety of requirements far afield from *Bieter*'s relatively liquid functional relationship analysis that was tied to the goals of the privilege.

For example, some courts apply an analysis that requires the nonemployee to have duties and roles identical to that of the court's view of a "de facto employee" or a "full-time employee."[163] *Upjohn* does not

158. *Bieter*, 16 F.3d at 936.
159. *Id.* at 938.
160. *See id.*
161. *See id.*
162. *See id.* at 938–39.
163. In *People v. McQueen*, the court stated: "For the functional equivalent exception to apply, the third-party must assume the functions and duties of a full-time employee." People v. McQueen, 451825/2019, 2020 WL 1878107, at *3 (N.Y. Sup. Ct. Feb. 21, 2020). In *Frank v. Morgans Hotel Grp. Mgmt. LLC*, the court stated: "The overall inquiry, these decisions suggest, is whether a consultant or other contractor has in practice 'assum[ed]

require an employee to be a "full-time employee" in order to be a representative of an entity client. Yet, the nonemployee analysis of some courts has used this concept.

Other courts have looked at factors such as whether the nonemployee "exercised independent decision-making on the company's behalf"; whether the nonemployee "served as a company representative to third parties"; whether the nonemployee "maintained an office at the company or otherwise spent a substantial amount of time working for it"; and whether the nonemployee "sought legal advice from corporate counsel to guide his or her work for the company."[164] In In re *Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*,[165] the court listed these factors that it gleaned from other opinions and applied them to nonemployee consultants. One of the consultants was an expert on Federal Drug Administration (FDA) processes and was engaged to assist with dealing with the FDA.[166] The second consultant was an expert in governmental affairs and was engaged to assist with dealing with the FDA and Congress.[167] The court concluded that the consultants in question were not "*de facto* employees."[168] They did not make decisions themselves, they did not appear with third parties as the company's representatives, they worked out of their own offices that were not located at the company, they used email addresses that did not belong to the entity, and "likely served as consultants for other companies while they were assisting" the company.[169] They also were not "so integrated into its corporate structure that [they] sought and received legal advice from [the entity]'s counsel, rather than solely providing [their] input to [the entity]'s counsel and staff."[170]

In the *Restasis* court's view, the nonemployees must be "like" the *court's* view of an employee rather than, in the court's words, "typical part-time consultants."[171] The nonemployees also must be "like" a very special type of employee who seeks advice from the entity's counsel,

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the functions and duties of [a] full-time employee' and has been 'so thoroughly integrated' into the corporation's structure that he or she 'is a de facto employee of the company.'" Frank v. Morgans Hotel Grp. Mgmt. LLC, 116 N.Y.S.3d 889, 892 (N.Y. Sup. Ct. 2020) (quoting Export-Import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005)).

164. *In re* Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 352 F. Supp. 3d 207, 213 (E.D.N.Y. 2019) (applying functional equivalence to find no privilege protection, the court was "skeptical" that the Second Circuit would "adopt the exception").

165. 352 F. Supp. 3d 207 (E.D.N.Y. 2019).

166. *See id.* at 209.

167. *See id.* at 210.

168. *Id.* at 215.

169. *Id.*

170. *Id.*

171. *Id.* at 214.

makes decisions for the company, and such. These requirements require the nonemployee to be very similar to a control group employee. Yet, at least for purposes of federal law, *Upjohn* long ago rejected the idea that an employee must be a member of the control group to be a representative of the entity for purposes of the entity's attorney-client privilege. Such requirements for nonemployees do nothing to further the goals of the privilege and can frustrate those goals, whether the individual is an employee or nonemployee.

Another influential case that applied the functional equivalent analysis very narrowly, adding requirements beyond those required for employees that do nothing to further the goals of the privilege, is *Export-Import Bank of the United States v. Asia Pulp & Paper Company*.[172] In *Export-Import Bank*, the court addressed the question of whether a corporation's privilege applied to communications involving the corporation's attorney and a consultant or the consultant's employees. The corporation had engaged the consultant and thus the consultant's employees to assist the corporation with debt restructuring.[173] The *Export-Import Bank* court stated:

> To determine whether a consultant should be considered the functional equivalent of an employee, courts look to whether the consultant had primary responsibility for a key corporate job, . . . whether there was a continuous and close working relationship between the consultant and the company's principals on matters critical to the company's position in litigation, . . . and whether the consultant is likely to possess information possessed by no one else at the company.[174]

For each of these elements stated by the *Export-Import Bank* court, the court cited In re *Bieter* as the source for the requirement.[175] Note, however, that in *Bieter* the nonemployee had an important corporate job, but the *Bieter* court did not require such. In other words, what in *Bieter* was a characteristic of the situation before the court relevant in the court's analysis, became, perhaps, a requirement for the *Export-Import Bank* court. In evaluating the situation before it, the *Export-Import Bank* court

172. 232 F.R.D. 103 (S.D.N.Y. 2005). An example of the influence of this case is *In re* Dealer Mgmt. Sys. Antitrust Litig., 335 F.R.D. 510 (N.D. Ill. 2020). The court in *Dealer Management* refused to apply the functional equivalent concept but then concluded that if it did apply the doctrine, the nonemployee would not pass the test for functional equivalence. The court then stated a test taken from *LG Elec. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958, 963 (N.D. Ill. 2009), which, in turn, is based on the test stated in *Export-Import Bank of the United States v. Asia Pulp & Paper Co.*, 232 F.R.D. 103 (S.D.N.Y. 2005). *See In re Dealer*, 335 F.R.D. at 518; *see also* Anderson v. Seaworld Parks & Ent., Inc., 329 F.R.D. 628, 634 (N.D. Cal. 2019) (listing *Export-Import Bank* factors).

173. *See Export-Import Bank*, 232 F.R.D. at 107.

174. *Id.* at 113 (citations omitted).

175. *See id.*

noted that the entity had "the burden of showing that [the nonemployee] and his associates meet this standard of integration into the [entity's] corporate structure" and failed to do so.[176] Though the entity provided the consultant an office at the company, he rarely used it.[177] In addition, the court noted that though the consultant testified that he spent eighty-five percent of his time on the entity's matter, he had enough time to start another business.[178] Though the entity "demonstrated [the nonemployee] was intimately involved in [the entity]'s restructuring talks," the court stated that his "efforts are precisely those that any financial consultant would likely make under the circumstances."[179] The court concluded:

> [The consultant]'s schedule, the location of his head offices, and the success of his consulting business all contradict the picture of [the consultant] as so fully integrated into the [entity] hierarchy as to be a *de facto* employee of [the entity]. Possibly [the consultant] was able to do both—run his company and function as an [entity] employee—but it was [the entity]'s job to prove that he did, and [the entity] has failed to do so.[180]

What began in *Upjohn* and was expanded in *Bieter* was a functional analysis to determine who, employee of the entity or not, agent of the entity or not, had a relationship with the entity significant enough to be thought of as a representative of the entity for purposes of the privilege. Who is a true entity insider, a true member of the team? Following *Upjohn*, such an individual must also have information needed by the entity's lawyer to render legal advice to that entity. In the *Export-Import Bank* case, the *Restasis* case, and other cases with similar reasoning, the process of identifying a nonemployee who can be a representative of the entity client has devolved into a matching test as a proxy for a relationship test. Does this nonemployee have the characteristics of an employee—does the nonemployee "look like" an employee? This match game analysis then leads to consideration of characteristics of an employee that are irrelevant to the nature of the relationship between the nonemployee and the entity, the nonemployee and the matter, and the nonemployee and the needed information. In addition, this approach is rife with characteristics that are hardly characteristics of employees of the twenty-first century, especially in post-pandemic times. If an employee has a separate business on the side, does that make the employee less of an employee? It apparently made the consultant in *Export-Import Bank* look less like an employee.

176. *Id.*
177. *See id.*
178. *See id.* at 113–14.
179. *Id.* at 113.
180. *Id.* at 114.

Finally, these courts have added factors to consider in this analysis that, if applied to employees, would bar many employees that might have information about the entity client that the entity lawyer needs from being representatives of the client for purposes of the privilege. Such a result is clearly contrary to the teachings of *Upjohn* and the rationale underlying the entity attorney-client privilege. For example, the *Export-Import Bank* court listed as a factor "whether the consultant had primary responsibility for a key corporate job."[181] Yet, in *Upjohn* the Supreme Court accepted the notion that employees who have information necessary for the entity's attorney to render legal advice to the entity can be representatives of the entity for purposes of the privilege regardless of the status of those individuals if they learned that information in the scope of the employment. To require that the nonemployee have "primary responsibility for a key corporate job" resurrects the control group requirement that the *Upjohn* Court specifically rejected, at least for purposes of federal law.[182] Indeed, such a test would exclude nonemployees who are clearly agents of the entity for certain purposes under principal and agency principles.[183]

C. *The Relationship of the Functional Equivalent Analysis with Agency Status of Nonemployees*

An additional theoretical confusion in the midst of courts' attempts to deal with a functional equivalent analysis is the analysis's relationship with agency principles. Assuming nonemployees have information an entity's lawyer needs to properly represent the entity, have courts used the functional equivalent analysis as a method of identifying nonemployees who are agents of the entity such that they can be representatives of the entity client for purposes of the privilege? In other words, are courts using the functional equivalent analysis as a means of determining nonemployees who qualify as agents so that their communications with the entity's lawyer are protected by the corporation's privilege? Such an analysis would omit agents that are not "like" employees. Or rather, have courts used the functional equivalent analysis a method of identifying nonemployees who can be representatives of the corporate client for purposes of the privilege *regardless of agency status*?

Courts have not been clear. They generally have not analyzed agency when they have discussed functional equivalence.[184] At most, a court

181. *Export-Import Bank*, 232 F.R.D. at 113.

182. *See supra* Part IV.B (discussing *Upjohn*).

183. *See supra* Part VI (discussing agency).

184. *See generally* Frank v. Morgans Hotel Grp. Mgmt., LLC, 116 N.Y.S. 3d 889 (N.Y. Sup. Ct. 2020) (including no mention of agency); Narayanan v. Sutherland Glob. Holdings Inc., 285 F.Supp.3d 604 (W.D.N.Y. 2018) (including no agency discussion).

identifies the nonemployee as an agent (or not) with no analysis of the status based in agency law.[185]

The Washington Supreme Court varied from the norm in *Hermanson v. MultiCare Health System, Inc.*[186] The *Hermanson* Court applied both agency analysis and, independently, a functional equivalent analysis. The Court held that an independent contractor was both an agent and the functional equivalent of an entity employee.[187]

In *Hermanson*, the Court faced the question of whether a lawyer representing MultiCare, an entity that owned a hospital, could communicate *ex parte* with the plaintiff's treating physician.[188] The plaintiff had been treated at the hospital by various people, including a physician who was not an employee of MultiCare. The doctor was an employee of another entity and was an independent contractor vis-à-vis MultiCare.[189] If the hospital entity's privilege protected the communications between MultiCare's lawyer and the physician, then the entity's privilege, in effect, trumped Washington's rule that banned opposing counsel from talking *ex parte* with the plaintiff's treating physician. Thus, the Washington Supreme Court reached the question of the scope of MultiCare's privilege on the way to a holding about *ex parte* communications.[190] There was no doubt that the physician had information pertinent to the litigation given that he was the plaintiff's treating physician.[191]

The physician in *Hermanson* was an employee of another entity, Trauma Trust.[192] Trauma Trust had been created, in part, by MultiCare.[193] Trauma Trust contracted to provide the physician to MultiCare.[194] The agreement between the entities provided: "[E]ach party is an independent contractor with respect to the others. Except as expressly provided in this

185. *See, e.g.*, Glob. Textile All., Inc. v. TDI Worldwide, LLC, 847 S.E.2d 30, 35 (N.C. 2020) (concluding that a nonemployee had no duties so was not an agent; functional equivalent analysis does not apply); U.S. *ex rel.* Wollman v. Mass. Gen. Hosp., Inc., 475 F. Supp. 3d 45, 68 (Mass. 2020) (determining the functional equivalent doctrine "'provides that certain third-party agents of corporate entities, such as consultants, can be considered the "functional equivalent" of corporate employees'") (quoting Lynx Sys. Developers, Inc. v. Zebra Enter. Sols. Corp., Civil Action No. 15-12297-GAO, 2018 WL 1532614, at *2 (D. Mass. Mar. 28, 2018)).

186. 475 P.3d 484 (Wash. 2020).

187. *See id.* at 486 (concluding that the independent contractor "maintains a principal-agent relationship with [the entity] and serves as the 'functional equivalent' of a MultiCare employee").

188. *See id.*

189. *See id.* at 489.

190. *See id.* at 488–89.

191. *See id.* at 489 (explaining that the physician was the doctor who treated the plaintiff during the plaintiff's stay at the MultiCare hospital).

192. *See id.* at 486.

193. *See id.*

194. *See id.*

agreement, *no party is authorized or permitted to act or to claim to be acting as an agent or employee of any other party*."[195]

The *Hermanson* Court first focused on the agency status of the physician, not on functional equivalence. Applying a fluid agency analysis, the court determined that the independent contractor physician was an agent of the hospital entity, MultiCare, despite the fact that the physician was not an employee of MultiCare.[196] In so doing, the court distinguished the situation of former employees who were no longer agents of the entity.[197] The court noted that the physician had an office at the hospital and was expected, as a result of the contract between MultiCare and Trauma Trust, to follow MultiCare policies and procedures.[198] The *Hermanson* Court stated that the key element to an agency relationship is the principal's control of the details of the agent's work.[199] Because MultiCare was a founder of Trauma Trust, the physician had an office at the hospital, and the physician was expected to follow MultiCare policy and procedure, the court concluded that the physician "'owes duties of loyalty, obedience, and confidentiality'" to MultiCare even as an independent contractor and "maintains a principal-agent relationship with" MultiCare, the hospital entity.[200] Thus, the court, basing its decision on the reality of the situation and ignoring any contrary contract language denying agency, recognized the physician, and independent contractor, as the agent of the entity principal.[201]

The *Hermanson* Court then also determined that the physician was a "'functional equivalent' of MultiCare's employee."[202] The *Hermanson* Court stated a conceptual version of the functional equivalent analysis as described in *In re Bieter*,[203] not focusing on the intricate details of the *Bieter* fact situation as the *Export-Import Bank* court had done.[204] Rather, the *Hermanson* Court followed the more-generalized teaching of the *Bieter* court: the privilege applied to "nonemployees 'who possess a "significant relationship to the [client] and the [client]'s involvement in

195. *Hermanson*, 475 P.3d at 494 (Stephens, C.J., concurring in part and dissenting in part) (emphasis in original).

196. *See id.* at 489 ("[The physician] still maintains a principal-agent relationship with MultiCare . . . .").

197. *See id.* (distinguishing the holding in *Newman* which refused to apply entity's attorney-client privilege to communications between entity lawyer and former employees even when employees were the source of vital information needed for lawyer to advise entity client). *See supra* Part V.B (discussing *Newman*).

198. *See id.* at 489–90.

199. *See id.* at 489 (citing Wilcox v. Basehore, 387 P.3d 531 (Wash. 2017)).

200. *Id.* (quoting *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1192 (Wash. 2016)).

201. *See id.*

202. *Id.*

203. 16 F.3d 929 (8th Cir. 1994).

204. *See Hermanson*, 475 P.3d at 489–90; *see also* discussion *supra* Part IV.B.2.

the transaction that is the subject of legal services.'"'"[205] The *Hermanson* Court then found that the physician-nonemployee "maintains a 'significant relationship' to MultiCare," acting as a trauma surgeon in the hospital with an office there, and, in accord with the agreement between MultiCare and Trauma Trust, the employer of the physician, "reports his work" to the hospital.[206] In addition, the physician treats patients at the hospital "under the purview" of MultiCare and works "on behalf of *both* MultiCare and Trauma Trust."[207] The *Hermanson* Court concluded: "Unlike most independent contractors who are hired on a project-by-project basis, [the physician] constantly performs work in a MultiCare facility that is consistently monitored by MultiCare, thus making him the 'functional equivalent' of a MultiCare employee."[208] Thus, the *Hermanson* Court held that MultiCare's attorney-client privilege protected MultiCare's counsel's conversations with the independent contractor physician and MultiCare's lawyer thus could have *ex parte* conversations with that doctor even though he was also the plaintiff's treating physician.[209]

Interestingly, the *Hermanson* Court never clearly stated the relationship between agent status and functional equivalence. While the Court found the physician to be both an agent and the functional equivalent of an entity employee, it is not clear whether the Court considered both conclusions to be necessary. Given the Washington Supreme Court's earlier *Newman* opinion that refused to apply the entity's privilege to former employees because they were no longer agents,[210] a logical conclusion is that the *Hermanson* Court required the physician to be MultiCare's agent. But then what is the place of the functional equivalent analysis?

VIII. AN IMPROVED FUNCTIONAL EQUIVALENT ANALYSIS

Is there a functional equivalent approach that is closely aligned with *Upjohn*'s view of the rationale of the privilege and also eases courts' burden of determining the scope of entity privilege in light of the vast array of nonemployees used in the economic enterprise in which entities are

205. *Hermanson*, 475 P.3d at 490 (quoting In re *Bieter*, 16 F.3d at 938 (quoting Sexton, *supra* note 1, at 487)). The court also noted that the Ninth Circuit had approved of the functional equivalent approach in United States v. Graf, 610 F.3d 1148 (9th Cir. 2010).

206. *Hermanson*, 475 P.3d at 490.

207. *Id.*

208. *Id.* at 490. One might debate the court's assumption that independent contractors are usually hired on a project basis. This is yet another example of a court's idiosyncratic view of what is an employee that may, or may not, be based in fact.

209. *See id.* The court further noted that its holding was not dependent on whether MultiCare, the entity, was vicariously liable for the physician's conduct.

210. *See* Newman v. Highland School Dist. No. 203, 381 P.3d 1188, 1193 (Wash. 2016) (en banc); *see also supra* Part V.B (discussing the Washington Supreme Court's *Newman* opinion).

involved? First, courts must return to the teachings of *Upjohn*. The Supreme Court in *Upjohn* held that Upjohn's attorney-client privilege could apply to employees if those individuals had vital information needed by the entity's counsel to represent the entity *and* if a court determined that there should be a "'[r]ecognition of a privilege based on a confidential relationship . . . on a case-by-case basis.'"[211] The *Upjohn* Court listed factors to consider but did not state a rule.[212] The rationale of this approach was that this method of analysis best accomplishes the stated goals—that the entity lawyer can best advise the entity client and, ultimately, society writ large can benefit.[213]

With this guiding light in mind, courts, when considering whether nonemployees are representatives of an entity client for purposes of the privilege, must evaluate whether recognizing the nonemployee as a representative of the entity furthers the purposes of the privilege. If the nonemployee has information needed by the entity's lawyer, the focus must be on whether the nonemployee has a significant relationship with the entity such that the court should recognize the nonemployee as a representative of the entity for purposes of the privilege.

The functional equivalent analysis should consider the significance of the *relationship* between the entity and the nonemployee. The functional equivalent analysis should not be an analysis focused on whether the nonemployee has traits the court identifies as employee traits. Those traits vary widely in the economy of the twenty-first century and are certainly not what some courts believe them to be.[214] Even as a matter of employment law, the concept of an employee is shifting.[215]

In addition, some courts in the past have required traits that are far beyond traits of employees, narrowing the application of the privilege to nonemployees that are similar to control group employees.[216] This is a far

211. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981) (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

212. *See Upjohn*, 449 U.S. at 394–95; *see also supra* Part IV.B (discussing the *Upjohn* opinion).

213. *See id.* at 389.

214. For example, the court in *Export-Import Bank of the United States v. Asia Pulp & Paper Co.* focused on where the consultant did the work, noting that though he had an office at the entity, he rarely used that office and physically worked elsewhere. *See* Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005). Now, remote work abounds for employees and nonemployees alike.

215. *See* Chichester & Behnia, *supra* note 41 (discussing changes in the definition of "employee" in California); *see also* Jaffe, *supra* note 43 (discussing the changing classification of workers for purposes of employment law).

216. *See supra* Part VII.B. *See, e.g.*, People v. McQueen, 451825/2019, 2020 WL 1878107 (N.Y. Sup. Ct. Feb. 21, 2020) (discussing the functions of a "full-time employee"); Export-Import Bank of the U.S, v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (discussing a "key corporate job").

cry from *Upjohn*'s rejection of a control group test for employees and inconsistent with *Upjohn*'s statement of the privilege's rationale.

Courts can approach the question of whether a nonemployee can be a representative of a client without focusing on principal and agent relationships. The law of principal and agent may be difficult for courts to translate to the context of entities and nonemployees and the attorney-client privilege. A court may determine that a nonemployee has the required information and has a significant relationship with the entity and matter that justifies recognizing that nonemployee as a representative of the entity for purposes of the privilege—that applying the entity's privilege to communications involving the entity's lawyer and the nonemployee furthers the purposes of the privilege. That nonemployee may be an agent of the entity. But the functional equivalent analysis would not require that agency determination in addition to the functional equivalent analysis. It is enough that the court finds the requisite significant relationship. As the Colorado Supreme Court has stated in *Alliance Construction Solutions, Inc. v. Department of Corrections*,[217] in the context of a government entity, the privilege protects communications with the entity's lawyer when "the information-giver" is "an employee, agent, or independent contractor with a significant relationship not only to the governmental entity but also to the transaction that is the subject of the governmental entity's need for legal services."[218]

Other courts have perceived the need for a broad view of the functional equivalent analysis.[219] For example, the United States Court of Appeals for the Eleventh Circuit, in *Berisha v. Lawson*,[220] has used the functional equivalent analysis more broadly. In *Berisha*, the plaintiff claimed the defendant author defamed him in a book published by Simon & Schuster.[221] The plaintiff sought disclosure of communications that occurred during the pre-publication review involving the author and attorneys representing the publishing house. The district court held that Simon & Schuster's attorney-client privilege protected the communications even though the author was not an employee of the publishing house.[222]

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217. 59 P.3d 861 (Colo. 2002).

218. *Id.* at 869.

219. *See, e.g.*, American Ins. Co. v. Pine Terrace Homeowners Ass'n, 2021 WL 2036541 (D. Colo. May 21, 2021) (applying the *Alliance* approach).

220. 973 F.3d 1304, 1318 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2424 (2021) (mem.).

221. *See id.* at 1308–09. The book was the basis of the movie *War Dogs*, starring Jonah Hill and Miles Teller. *See id.* at 1309.

222. *See id.* at 1317.

The Eleventh Circuit, applying New York law, affirmed on this issue.[223] The court viewed the "'employee equivalent'" doctrine as an "extension" of the *Upjohn* decision,[224] noting that some courts have held that the teachings of *Upjohn* mean that even nonemployees may be covered by the entity's attorney-client privilege if the nonemployee "acts as the functional equivalent of an employee for the relevant matter."[225] The *Berisha* court refused to require the nonemployee to be the same as an employee for purposes of agency or employment law.[226] The court noted that the plaintiff had argued that the functional equivalent doctrine can only apply when the nonemployee "looks, acts, and smells like a company employee . . . ."[227] The court characterized this argument as resting on the "premise that, for purposes of New York's attorney-client privilege law, the scope of the 'employee-equivalent' doctrine is to be understood similarly to the definition of an 'employee' in the context of agency or employment law."[228] The court rejected such an approach, noting that such a narrow view "misconceives the purposes underlying the doctrine."[229] Too narrow a view of who can be a representative of a lawyer's entity client can "frustrate the attorney's efforts to formulate sound legal advice based on information possessed by those directly involved in the matter."[230] The court then stated:

> *Bieter*'s core holding is thus that the privilege must extend to cover "nonemployees who possess a significant relationship to the client and the client's involvement in the transaction that is the subject of legal services," and who therefore "have the relevant information needed by corporate counsel" to advise the client.[231]

The *Berisha* court noted that this approach means that occasionally nonemployees who do not act like employees as that term may be defined by other areas of the law must be considered representatives of the client for purposes of the attorney-client privilege.[232] While employee characteristics "are useful in evaluating the nonemployee's 'relationship

223. *See id.* at 1320–21.

224. *Id.* at 1317 (citing Upjohn Co. v. United States, 449 U.S. 383 (1981)).

225. *Id.* at 1318 (emphasis removed) (citing *In re* Bieter Co., 16 F.3d 929, 937 (8th Cir. 1994)).

226. *See id.* at 1318–19.

227. *Id.* at 1318 (internal quotations omitted).

228. *Id.* (citing *In re* Vega, 149 N.E.3d 401, 410–14 (N.Y. 2020)).

229. *Berisha*, 973 F.3d at 1319.

230. *Id.*

231. *Id.* (quoting *In re* Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994)).

232. *See id.* ("By its very nature, this includes individuals whom we might not—for other purposes in the law—consider to behave as 'employees' of the corporation.") (citing All. Constr. Sols., Inc. v. Dep't of Corr., 54 P.3d 861, 869 (Colo. 2002)).

to the client,' an absence of such factors does not necessarily destroy the application of the doctrine."[233]

Turning to the facts before it, the *Berisha* court noted the defendant author's relationship with the publishing house was that he was the author of the book that was the subject of the entity lawyers' pre-publication review and the book was the basis for the plaintiff's defamation claim.[234] The court stated that given that the author was the source of all sourcing and reference information regarding the book, the author's relationship to the entity and the transaction "could hardly be more significant."[235] The lawyers could not do a proper legal review without the information known to the author.[236] While the author's relationship with the publishing house did not "bear many of the hallmarks of a traditional employer-employee relationship," they were in a "*joint* effort to produce a published book to their mutual satisfaction[.]"[237] The contract between them enumerated the specific obligations of the parties in this regard.[238] Thus, the court concluded that the lower court did not err in finding that the nonemployee author was a representative of the entity, Simon & Schuster, for purposes of the publishing house's attorney-client privilege; the entity's privilege protected the communications between the entity's lawyers and the nonemployee author.[239]

The dissenting opinion of Justice Wiggins in *Newman v. Highland School District No. 203*[240] is also helpful in illustrating the proper and advantageous use of a fluid functional equivalent analysis to determine whether a nonemployee has "a sufficient identity of relationship to the corporation."[241] In *Newman*, the Washington Supreme Court refused to apply the school district's attorney-client privilege to protect communications involving counsel for the school district and former employees. The former employees were coaches involved in the incident

233. *Id.* (citing *Bieter*, 16 F.3d at 938); *see also All. Constr. Sols.*, 54 P.3d at 869 ("[W]e agree with the *Bieter* court that a formal distinction between an employee and an independent contractor conflicts with the purposes supporting the privilege. An independent contractor with a meaningful relationship to the [entity] may possess important information needed by the attorney to provide effective representation.").

234. *See Berisha*, 973 F.3d at 1319–20.

235. *Id.* at 1319.

236. *See id.*

237. *Id.*

238. *See id.* at 1320.

239. *See id.* at 1320; *see also* Twentieth Century Fox Film Corp. v. Marvel Enters., No. 01 Civ. 3016, 2002 WL 31556383, at *6 (S.D.N.Y. Nov. 15, 2002) (finding that the director and writer involved with film were functional equivalents to studio employees); Davis v. Costa-Gavras, 580 F. Supp. 1082, 1098 (S.D.N.Y. 1984) (finding that the movie studio's privilege applied to communications between the studio's lawyers and the author of the book that was the basis of the movie).

240. 381 P.3d 1188 (Wash. 2016) (en banc).

241. *Id.* at 1195 (Wiggins, J., dissenting).

that was the subject of the litigation but who were no longer employees at the time of the communication with the district's counsel.[242] The *Newman* majority refused to apply the entity's privilege to communications involving the former employees because they were not in an agency relationship with the school district when they communicated with the district's counsel.[243]

The dissent in *Newman* rejected the majority's employee agent status requirement,[244] noting that a status analysis was the sort of analysis the *Upjohn* case rejected when it rejected the control group inquiry for application of the corporate attorney-client privilege to employees.[245] In the dissent's view, the *Newman* majority rejected the functional analysis framework set forth in *Upjohn*, stating, "[b]y looking only at the identity of the former employee, the majority sidesteps around the important functional analysis contemplated by *Upjohn*."[246] In so doing the majority ignored that the purpose of the privilege, "facilitating the flow of relevant and necessary information from lower-level employees to counsel—was a key function of the privilege identified by the Court in *Upjohn* and a critical reason that Court extended the privilege to lower-level employees in the first place."[247]

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242. *See id.* at 1190 (Wiggins, J., dissenting).

243. *See id.* at 1193 (Wiggins, J., dissenting). *See supra* Part V.B (discussing *Newman*).

244. *See Newman*, 381 P.3d at 1194–95 (Wiggins, J., dissenting). The dissent acknowledged that the *Restatement (Third) of the Law Governing Lawyers* also denies application of the entity privilege to former employees generally because, absent special circumstances, they are not agent of the principal at the time they speak with counsel. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. e (AM. L. INST. 2000) (requiring an ongoing agency relationship at the time of the communication with the attorney for the corporation or other entity); *see also Newman*, 381 P.3d at 1198–99.

Regarding the *Newman* majority's position as well as the *Restatement*, the dissent states:

> Temporal concepts associated with the duration of agency, as they relate to the timing a communication is made to counsel, should not be dispositive of the privilege, as they bear little relationship to the goals of the privilege identified by the Supreme Court. It is for this reason that I would also reject the position articulated in the *Restatement (Third) of the Law Governing Lawyers §73(2)* and comment e that the privilege be limited to those with a present and ongoing agency relationship with the corporation. Such a position is incompatible with the *Upjohn* Court's focus on the nature of the communications, rather than on the formalities of the relationship to the corporation.

Newman, 381 P.3d at 1199.

245. *Newman*, 381 P.3d at 1195 (Wiggins, J., dissenting) ("This temporal limitation is at odds with the functional analysis underlying the decision in *Upjohn* and ignores the important purposes and goals that the attorney-client privilege serves.").

246. *Id.* at 1196 (Wiggins, J., dissenting) ("[T]he majority's focus on the formalities of the relationship between the employee and the corporation as the standard for the attorney-client privilege misses the point of the *Upjohn* Court's functional framework.").

247. *Id.* at 1197 (Wiggins, J., dissenting).

The *Newman* dissent embraced the test set forth in *Peralta v. Cendant Corporation*[248] for identifying former employees who can be representatives of the entity for purposes of the entity's privilege. If the communications with the former employee "'relate to the former employee's conduct and knowledge, or communication with [the entity's] counsel, during his or her employment,'"[249] then the communication involving the former employee should be protected by the entity's attorney-client privilege assuming all other requirements of the privilege obtain.[250]

The *Newman* dissent also agreed with the *Peralta* court that each of the factors discussed in *Upjohn* need not be present for the individual to be a representative of the client for purposes of the entity's privilege; they were factors, not requirements.[251] The *Newman* dissent noted that the *Peralta* correctly focused on the rationale and purpose of the privilege and whether privilege application furthered that purpose.[252] Thus, in both *Peralta* and in *Newman*, opined the dissent, the fact that the former employees were not directed by management of the entity to speak with the entity's counsel should not result in denial of the privilege for the communication.[253]

Addressing the *Newman* majority's reliance on the lack of an agency relationship as a basis of its decision, the *Newman* dissent noted that the majority inappropriately emphasizes agency characteristics such as an agent's duty of loyalty and obedience that should not be important in a privilege discussion because "they bear little relationship to the goals of the privilege identified by the Supreme Court."[254] The dissent noted that the Supreme Court in *Upjohn* did not discuss the duty of loyalty or obedience at all, commenting that "[t]he privilege itself is not grounded in concepts of a duty on behalf of the client to disclose information to its attorney, just as its extension to lower-level employees is not based on their duty to provide information to the corporation."[255]

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248. 190 F.R.D. 38, 41 (D. Conn. 1999).

249. *Newman*, 381 P.3d at 1198 (Wiggins, J., dissenting) (quoting Peralta v. Cendant Corp., 190 F.R.D. 38, 41 (D. Conn. 1999)).

250. *See id.* at 1198 (Wiggins, J., dissenting) ("The *Peralta* court that adopted this test noted it was rejecting a wholesale application of the specific *factors* identified in *Upjohn* because former employees, unlike current employees, were not directed to speak with corporate counsel at the direction of management.").

251. *See id.* at 1198 (Wiggins, J., dissenting) ("reject[ing] a wholesale application of the specific *factors* identified in *Upjohn* because former employees, unlike current employees, were not directed to speak with corporate counsel at the direction of management").

252. *See id.* (Wiggins, J., dissenting).

253. *See id.* (Wiggins, J., dissenting); Peralta v. Cendant Corp., 190 F.R.D. 38, 41 (D. Conn. 1999).

254. *Newman*, 381 P.3d at 1199 (Wiggins, J., dissenting).

255. *Id.* at 1198 (Wiggins, J., dissenting).

In the *Newman* dissent's view, the *Newman* majority's emphasis on agency ignores the fact that the *Upjohn* Court applied Upjohn's privilege to lower-level employees even though those employees were not in the control group because those individuals' knowledge and actions can create legal consequences for the corporation.[256] Thus, the corporation's attorney should be allowed to access the vital information those employees possess. In the *Newman* dissent's view, that same rationale supports applying the entity privilege to communications between the entity's counsel and former employees since the former employee continues to have that information and the entity continues to be liable for the past actions and knowledge of the former employee. The status change does not change the situation for purposes of the privilege.[257]

The *Newman* dissent's argument applies as well to nonemployees who were not former employees. If those nonemployees have vital information that the entity attorney needs to properly advise the entity client, and if the nonemployee's relationship with the entity is a significant relationship, such as when the entity would be responsible for the nonemployee's actions, then the entity's privilege should protect the communications involving the nonemployee and the entity's lawyer. Without doubt, such nonemployees are not simply third-party witnesses.

A nonemployee with a significant relationship with the entity may have a different role and have different characteristics in different contexts. A court may apply the entity's privilege to former employees by recognizing the earlier employee relationship at the time the individual obtained the relevant information as evidence of a significant relationship. The entity, after all, is likely responsible for the former employees' actions during the employment. In many situations, a nonemployee who has the vital information is a member of the entity team on an ongoing basis, not simply a one-time project basis such that a court can conclude that the relationship between the entity and the nonemployee is truly significant.

A nonemployee engaged to assist with an isolated litigation matter likely would not have such a significant relationship. So, for example, if a corporation has litigation on the horizon as the result of a cyberattack and that entity contracts with a media relations firm to assist with the presentation of the corporation's situation to the public, communications between the attorney and the employees of the public relations firm should not be protected by the entity's privilege. The public relations firm's employees are not the source of information about the cyberattack needed by the entity's lawyer as an initial matter, and secondly, they do not have a significant relationship with the entity client or the cyberattack. Thus,

256. *See id.* at 1198–99 (Wiggins, J., dissenting).
257. *See id.* at 1199 (Wiggins, J., dissenting).

the public relations firm's employees are not properly representatives of the entity client for purposes of the entity's privilege, though they may be agents of the entity for other purposes.[258]

In contrast, a nonemployee information technology specialist who has worked every day for two years embedded in the corporation's environment whether or not physically working "at" or "in" the entity is likely a corporate insider, a nonemployee with a significant relationship with the entity, if the specialist's job included matters related to the cyberattack. Such a nonemployee may have information vital to the lawyer's representation of the entity. The corporation's attorney-client privilege should apply to that nonemployee's communications with the corporation's lawyer about the cyberattack.

A bright-line rule that *excludes* all nonemployees such as the nonemployee information technology specialist in this example is too strict a rule to accomplish the goals of the privilege. A bright-line rule that *includes* the nonemployee public relations specialist is too broad a rule—it perhaps accomplishes the goals of the privilege but at too great a cost. The courts must keep the privilege "contained within appropriate boundaries"[259] and be mindful of the purpose of the privilege. The significance of the nonemployee's relationship with the entity is the regulator of the privilege's boundary.

IX. CONCLUSION

In the years since the United States Supreme Court decided *Upjohn Company v. United States*,[260] courts have struggled with the question of whether an entity's attorney-client privilege can protect communications between the entity's lawyer and a nonemployee who has information the entity's lawyer needs to best advise the entity. During this same time, entities such as corporations have incorporated nonemployees in their enterprise in all sorts of roles.

In an attempt to address this issue, courts have developed a functional equivalent analysis. Some courts have applied this analysis so that a nonemployee cannot be a representative of the entity client unless the nonemployee is the functional equivalent of an entity employee. Some courts have focused on whether the nonemployee has traits, that, in these courts' sometimes misguided opinions, are traits of employees. Some courts have required that the nonemployee have an even narrower set of

258. *See, e.g.*, Behunin v. Superior Ct., 9 Cal. App. 5th 833, 852–53 (Cal. Ct. App. 2017) (finding that a public relations consultant engaged to assist with the matter was not a functional equivalent).

259. Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1046 (D. Del. 1985).

260. 449 U.S. 383 (1981).

traits that, if required of employees, would be incompatible with the *Upjohn* opinion regarding employees.

A functional equivalent analysis that focuses on required traits of an entity employee in an employment law sense is becoming more and more useless as each day of the twenty-first century unfolds. The reality of entities of the twenty-first century is that nonemployees often have roles that employees had only a few years in the past. In addition, traits of employees, especially in post-pandemic times, may not match an employee definition based on earlier times. In any case, characteristics of the nonemployee that are important for employment law purposes generally do not relate logically with the entity's attorney-client privilege and its underlying rationale. In addition, the relationship of the functional equivalent analysis, as many courts have applied it, to agency principles is also problematic.

A rational functional equivalent analysis consistent with the goals and rationale of the attorney-client privilege for entities such as corporations must focus on two issues. First, the analysis must focus on whether the nonemployee is a source of information integral to the entity lawyer's representation of the entity. Second, the analysis must focus on whether the nonemployee has a significant relationship with the entity—a relationship of closeness similar to the relationship an employee has to an employer. The focus is not on whether the nonemployee is the functional equivalent of an employee. The question is whether the nonemployee's *relationship* with the entity is the functional equivalent of an employee's *relationship* with the entity. Is the nonemployee a member of the team? Is the nonemployee an entity insider? Is this a situation in which the nonemployee can bind the entity or the entity is responsible for the nonemployee's statements or actions?

If the nonemployee has the information important to the representation and if the nonemployee has a significant relationship with the entity, then the nonemployee can be a representative of the entity client for purposes of the entity's attorney-client privilege. Thus, the entity's privilege can protect communications between the lawyer for the entity and the nonemployee.

The determination of whether the nonemployee has the sort of information the entity's lawyer needs to represent the entity should not be a difficult one. The matter before the court and the relationship the nonemployee has to that matter should provide the answer to the court.

Whether the nonemployee has a significant relationship with the entity can be more complex. What that relationship might look like will vary from case to case. Economic entities of the post-pandemic twenty-first century are many and varied; their methods of staffing and pursuing their goals are varied as well. Yet, a court can, in the exercise of wizened

judgment honed on the bench, discern significant relationships from lesser ones. A court can discern whether a nonemployee is so involved with the entity and the matter as to be considered a member of the entity team who should be viewed as a representative of the entity client for purposes of the privilege. A court can also, in contrast, discern that the nonemployee does not have a significant relationship with the entity and thus should be viewed as simply a fact witness whose communications with the entity's counsel are in no way protected by the entity's privilege. Such a functional equivalent analysis is no more complex that the multi-factor analysis the Supreme Court embraced in the *Upjohn* opinion for determining employees who are representative of the entity client for privilege purposes.[261]

In the process of using the functional equivalent analysis to determine whether a particular nonemployee is a representative of the entity client for purposes of the entity privilege, a court need not analyze agency. A nonemployee may very well be an agent of the entity for some purposes. Yet, the relevant question for privilege purposes is whether the nonemployee is a representative of the entity client—whether there is a significant relationship. As explained by the dissent in *Newman v. Highland School District No. 203*,[262] agency characteristics such as the duties of loyalty and obedience "bear little relationship to the goals of the privilege identified by the Supreme Court."[263]

A focus on the significance of the relationship also provides consistency of analysis across all kinds of nonemployees, whether they be former employees or nonemployees who have never been employees. With a focus on the relationship, a former employee can be a representative of the entity client if that former employee has the requisite information and the relationship between the entity and the former employee is significant. For many courts, the fact that the former employee was once an employee and gained the information while in that status would provide evidence of a significant relationship. Such would be especially true if the employer is responsible legally for the nonemployee's words or actions.

A functional equivalent analysis as described here is consistent with the goals of the entity privilege as stated by the Supreme Court in *Upjohn*. Also importantly, this approach to a functional equivalent analysis can be applied to the many forms economic enterprise takes today and may take in the future.

261. *See supra* Part IV (discussing *Upjohn*).
262. 381 P.3d 1188 (Wash. 2016) (en banc).
263. *Id.* at 1199.