

Privileged Communication with Current and Former Corporate Employees

BY BEN LEBSACK AND JOHN LEBSACK

In Upjohn Co. v. United States, the US Supreme Court determined that communications between current employees and the corporation's lawyers are protected by the attorney-client privilege, and a concurrence suggested extending that to former employees, but courts nationally are split on whether and how to apply that privilege to former employees. This article addresses conditions that could make communications with former employees privileged.

The bedrock principle of attorney-client privilege can get complicated when the client is a corporation or other form of legal entity.¹ While the corporation clearly is entitled to raise the privilege, it is less clear which communications are protected. That question sometimes arises with respect to communications with current employees, but it becomes even more difficult—and legally murky—when the corporation's attorney communicates with someone who no longer works for the company. Former employees often have crucial information, but the attorney may wonder if the privilege applies to an interview with a former employee. Confusing the matter further, courts across the country have not come to a consensus.

The Corporate Privilege Conundrum

Generally, communications between a corporation's lawyer and its current employees are privileged subject to a few conditions, including (1) the communication is made at the direction of corporate superiors and (2) the lawyer reasonably expects that the employee will treat the communication as confidential. But former employees typically are not obligated to follow the direction of their former superiors, so the same conditions are generally not met for communications between a corporation's attorney and its former employees.² Although the conditions underlying communications with former employees are different, several courts have held the privilege applies to former employees in the same way it applies to current employees, while other courts have universally rejected any extension of the privilege. Still others have adopted a more nuanced limited application, recognizing that a bright line test cannot account for the various types of attorney communications. These courts distinguish between (1) privileged communications about

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information the former employee obtained during their employment and (2) unprivileged communications about information obtained outside of employment. These approaches are discussed later in this article.

On the surface, a blanket application or rejection of the privilege might seem appealing because it provides the most predictability for attorneys—the privilege either does or does not apply to communications with former employees in the same way it applies to current employees. However, such an approach doesn't leave as much room for communication- or case-specific considerations as the nuanced approach. A blanket application ignores that the same conditions that give rise to the privilege with current employees do not generally exist with former employees, while a blanket rejection ignores that certain communications with former employees may meet these conditions. Put simply, a bright line rule does not account for all the subtleties of attorney communications.

Upjohn Extends the Privilege Beyond the “Control Group”

In *Upjohn Co. v. United States*, the US Supreme Court held that a corporation's attorney's communications with the corporation's employees were privileged because:

1. they were made to the corporate counsel, acting as such;
2. they were made at the direction of corporate superiors, for the purpose of securing legal advice from counsel;
3. they concerned matters within the scope of the employees' corporate duties; and
4. the employees were sufficiently aware that they were being questioned so the corporation could obtain legal advice.³

The case arose from a government investigation of corporate bribery of foreign governments. At the direction of Upjohn's attorneys,

the company sent questionnaires to overseas managers. Unsurprisingly, the government wanted to see the answers. *Upjohn* objected, citing attorney-client privilege and work product protections.

The lower court held that the privilege only extended to communications between the attorney and the “control group”—that is, those officers and agents who directed the attorney’s work. But the Supreme Court rejected that narrow framework, explaining that such a limited application “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.”⁴ *Upjohn* noted that middle- and lower-level “employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.”⁵

Colorado follows *Upjohn*.⁶ The Colorado Supreme Court has even extended the privilege to communications with independent contractors, determining that “a formal distinction between an employee and an independent contractor conflicts with the purposes supporting the privilege.”⁷

While *Upjohn* did not announce a general rule regarding the scope of the privilege for communications between a corporation’s attorney and its employees, Colorado courts generally examine the same four factors as *Upjohn*:

First, the information was provided by corporate employees to counsel acting as counsel for the corporation at the direction of corporate supervisors. Second, the purpose of the communications was to allow counsel to provide legal advice to the corporation. Third, the employees were made aware that they were being questioned by attorneys so that the corporation could secure legal advice. Last, the employees were informed that the communications were highly confidential.⁸

Thus, before questioning an employee, an attorney must give the employee an “*Upjohn*

warning” stating that the communication is for the purpose of legal advice to the corporation and must be kept confidential. Such warnings also clarify the distinction between legal advice, which is privileged, and business or human resources advice, which is not privileged.⁹ An *Upjohn* warning also prevents assertions by an employee that the employee owns the privilege.¹⁰

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The *Upjohn* Concurrence and Its Impact Extending the Privilege to Former Employees

Chief Justice Burger wrote a concurring opinion in *Upjohn* disagreeing with the majority’s decision to limit the holding to the facts of the case. He instead attempted to “articulate a standard that will govern similar cases.”¹¹ In

his view, the court should have announced a broader general rule that a “communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment.”¹²

Chief Justice Burger’s concurrence did not analyze why the privilege should extend to former employees. Outside of the concurring opinion, the only other references to former employees in *Upjohn* are in footnotes where the majority (1) stated that because the parties and lower courts did not analyze application of the privilege to communications with former employees, it would not reach that issue;¹³ and (2) referenced a discussion on work product as “relevant to counsel’s notes and memoranda of interviews with the seven former employees should it be determined that the attorney-client privilege does not apply to them.”¹⁴ The latter footnote did not address when the privilege would or would not apply in that instance.

Courts Applying the *Upjohn* Concurrence

Several courts have adopted Chief Justice Burger’s short comment, applying it to extend the privilege to communications between a corporation’s attorney and its former employees. For example, the Fourth Circuit extended the privilege to a communication where a former West Virginia Attorney General’s office employee provided information to a lawyer for that office who had to advise the office about a claim based on activities that happened during the witness’s employment.¹⁵ The Fourth Circuit emphasized a “need to know” rationale for the privilege, explaining that the “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.’”¹⁶ And the Ninth Circuit, in applying the privilege to communications between a corporation’s lawyer and a former employee during an “orientation session” before a deposition, explained that “the same rationale applies . . . Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or



potential difficulties.”¹⁷ Meanwhile, the Seventh Circuit declined to resolve whether the privilege extends to former employees, but it read the Fourth Circuit’s and Ninth Circuit’s holdings as concluding that “the distinction between present and former employees is irrelevant for purposes of the attorney-client privilege.”¹⁸ The Tenth Circuit has not yet addressed the issue.¹⁹

The Colorado Court of Appeals agreed with Chief Justice Burger’s concurrence in *Upjohn*, explaining that “the attorney-client privilege exists not only to protect the giving of professional advice to those who can act on it, but also the giving of information to the lawyer by lower level employees to enable the lawyer to give sound and informed advice.”²⁰ The Court of Appeals thus held that the privilege applies to “communications between counsel and former employees of the client which concern activities during their period of employment.”²¹ The Colorado Supreme Court cited this case when it extended the corporation’s privilege to its independent contractors,²² but it has not explicitly addressed whether the privilege broadly applies to former employees. So the question remains to be definitively resolved.

Courts Rejecting the Upjohn Concurrence

Other courts disagree with Chief Justice Burger’s inclusion of former employees within the privilege. Even though the rationale for extending the privilege to current and former employees

may be similar, these courts identify different underlying principles for the communications and thus doubt the basis for extending the privilege. For example, one Illinois court emphasized that the “reasoning of *Upjohn* does not support extension of the attorney-client privilege to cover post-employment communications with former employees” because:

Former employees are not the client. They share no identity of interest in the outcome of the litigation. Their willingness to provide information is unrelated to the directions of their former corporate superiors, and they have no duty to their former employer to provide such information. It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit.²³

Likewise rejecting the *Upjohn* concurrence, the Washington Supreme Court declined to extend the privilege to any communications between a corporation’s attorney and its former employees, reasoning that

everything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship. As a result, the former employee can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation. Without an 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, who may be freely interviewed by either party.²⁴

This reasoning is consistent with the *Restatement of Agency*, which explains that 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.”²⁵

Courts Limiting the Upjohn Concurrence

Many courts have applied Chief Justice Burger’s comment in a limited way, extending the attorney-client privilege to some but not all communications between a corporation’s attorney and its former employees. Illustrating this approach, a Connecticut court in *Peralta v. Cendant Corp.* examined whether “counsel for an employer can claim a privilege as to its attorney’s communications in preparing an unrepresented former employee for deposition by opposing counsel, and/or such attorney’s communications during the deposition about her testimony in that deposition.”²⁶

The *Peralta* court noted that the conditions underlying the basis for the privilege with current employees do not apply to former employees because they have no general duty to speak for the company, but it concluded

that some communications between counsel and a former employee are privileged.²⁷ The court explained that communications with a former employee about the “underlying facts of the case” are privileged.²⁸ But it reasoned that communications with a former employee regarding information about which she “would not have had prior or independent personal knowledge” are not “privileged, particularly given their potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously.”²⁹ In its view, communications about facts developed during litigation, such as testimony of other witnesses, settlement discussions, impressions about the case, or how the former employee is handling a deposition are not privileged.³⁰ In making this distinction, the court noted that “opposing counsel has the right to ask about matters that may have affected or changed the witness’s testimony.”³¹ The court concluded:

The distinction drawn by the Court between attorney-client privileged and non-privileged communications with former employees should not be difficult to apply if the essential point is kept in mind: did the communication relate to the former employee’s conduct and knowledge, or communication with defendant’s counsel, during his or her employment? If so, such communication is protected from disclosure by defendant’s attorney-client privilege under *Upjohn*. As to any communication between defendant’s counsel and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness’s testimony, consciously or unconsciously, no attorney-client privilege applies.³²

Most courts that have considered *Peralta* have found its reasoning persuasive. These courts make the same distinction between communications with former employees about the underlying facts and those about facts developed outside the employee’s knowledge, concluding the former are privileged.³³ While these courts have found that communications about underlying facts are privileged, they do not hold that the underlying facts themselves are privileged. Indeed, the privilege only protects

disclosure of communications, not disclosure of the underlying facts.³⁴ Under this approach, a former employee may reveal relevant facts within her or his knowledge; such facts are not protected merely because they were a part of a communication with corporate counsel.³⁵ And unlike current employees, a corporation’s lawyer may not instruct a former employee not to voluntarily share relevant information with another party.³⁶

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Thus, while *Peralta* provides a well-reasoned framework for examining privilege in the former employee context, it does not provide a bright-line rule for what communications are privileged.

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Other courts disagree with *Peralta* that the privilege protects communications about the underlying facts, concluding that because the employees in *Upjohn* spoke to counsel at the direction of corporate management, *Upjohn* has no application to former employees who maintain no agency relationship with the company.³⁷

Thus, while *Peralta* provides a well-reasoned framework for examining privilege in the for-

mer employee context, it does not provide a bright-line rule for what communications are privileged. Often, conversations with witnesses about the underlying facts involve discussion of facts outside of that witness’s recollection. Does a conversation about what claims a plaintiff has brought against a corporation based on events that occurred during the former employee’s employment pertain to the underlying facts or to facts developed outside of that employee’s knowledge? Is a discussion about the legal theory of the case a privileged communication about an underlying fact protected because it is based on what happened while the employee worked for the company, or is it an unprivileged communication about a fact developed after the person’s employment about which the witness has no independent knowledge? These are the types of questions to consider when assessing if the privilege could apply.

A Nuanced Approach

In rejecting an extension of the privilege to any communications between a corporation’s attorney and its former employees, the Washington Supreme Court highlighted that such a ruling “preserves a predictable legal framework.”³⁸ The court highlighted that “*Upjohn* recognized the value of predictability when determining the applicability of the attorney-client privilege”:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.³⁹

In reaching its conclusion, the Washington Supreme Court found predictability considerations particularly relevant where the question concerned

at what point in the employer-employee relationship the attorney-client privilege ceases to attach. All agree that it cannot extend forever and that it cannot encompass every communication between corporate counsel and former employees. But it is difficult to find any principled line of demarcation that extends beyond the end of

the employment relationship. We conclude that the interests served by the privilege are sufficiently protected by recognizing that communications between corporate counsel and employees during the period of employment continue to be privileged after the agency relationship ends.⁴⁰

In other words, a rule that communications between a corporation's attorney and its former employees are never privileged provides predictability. But a blanket exclusion of the privilege from such communications may interfere with a lawyer's ability to represent the client and undermine the purpose of the privilege. As the Colorado Supreme Court recognized, "the privilege exists to protect not only information communicated from attorney to client, but also information provided to the attorney so that [the attorney] may give sound legal advice."⁴¹

In *Denver Post Corp. v. University of Colorado*, the Colorado Court of Appeals applied *Upjohn* to extend the privilege to "communications between counsel and former employees of the client which concern activities during their period of employment."⁴² In reaching this conclusion, *Denver Post* highlighted *Upjohn*'s reasoning that "the attorney-client privilege exists not only to protect the giving of professional advice to those who can act on it, but also the giving of information to the lawyer by lower level employees to enable the lawyer to give sound and informed advice."⁴³ The Colorado Supreme Court cited *Denver Post*'s "holding that communications between . . . counsel and former employees . . . concerning activities during their period of employment may be protected by the attorney-client privilege . . ." in its conclusion that the privilege extended to communications between a corporation's counsel and independent contractors.⁴⁴ But the decision simply cites *Denver Post*; it does not affirm, approve, assess, or doubt the holding.⁴⁵

The decisions blanketly rejecting application of the privilege to communications with former employees rely, in part, on former employees having "no duty to their former employer to provide such information."⁴⁶ But there are situations where a corporation may be able to compel a former employee to provide informa-

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tion to the employer. For example, if a former employee agreed to a cooperation clause that extends past the employment, there would be a contractual basis for the corporation to direct the former employee to speak with the corporation's lawyer. Assuming a cooperation clause exists, a communication between a corporation's lawyer and its former employee would meet the four factors the *Upjohn* Court

examined, including speaking at the direction of corporate superiors.

Further, for the privilege to apply, the communication must occur "in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential."⁴⁷ So when it extended the privilege to communications between an attorney for the Department of Corrections and a representative from a construction company the department hired to build a prison, the Colorado Supreme Court emphasized that an "entity seeking to apply the privilege in the independent contractor context must show that the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents."⁴⁸

Thus, while a current employee may be bound by a confidentiality policy or agreement and a violation of the policy may be grounds for discipline or termination, a former employee may not owe any fiduciary or contractual duty of confidentiality to the employer since the same considerations no longer remain. Accordingly, if there are no consequences for failing to keep the communication confidential, a lawyer should not reasonably expect every former employee to keep the communication confidential.

Finally, as required in the independent contractor context, for the privilege to attach to a communication with a former employee, there should be a "significant relationship not only to the [former employer] but also to the transaction that is the subject of the [former employer's] need for legal services."⁴⁹ To illustrate, interviews with current employees—even those with no significant relationship to the circumstances at issue—may be privileged if they are part of due diligence or used to develop background information or evaluate the credibility of other witnesses. These same considerations generally do not apply to communications with former employees. When a former employee has no duty to speak to the attorney, no duty to keep the communication confidential, or no significant relationship to the events prompting the lawyer to speak to the former employee, the privilege likely would not attach to those communications.

Privilege and Ethics

This article focuses on the privilege between a corporation's attorney and its employees (an issue of law), but the attorney should also consider the duty to maintain client confidentiality (a rule of ethics). Privilege and confidentiality are related, but the ethical rule on confidentiality is broader than the duty to preserve privileged communications—it applies “not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”⁵⁰

As codified in Colorado,⁵¹ attorney-client privilege bars the examination of an attorney “without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment.”⁵² The statutory privilege is a shield intended to protect the client, not the attorney.⁵³ A lawyer may have a fiduciary duty to the client not to disclose privileged information, but that is not the source of the lawyer's ethical duty of confidentiality. Rather, that duty arises from Colo. RPC 1.6(a), which imposes a broad duty on a lawyer to keep confidential “information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”⁵⁴ And Colo. RPC 1.9(c)(2) extends this duty to information related to the representation of former clients.

Colorado's Rules of Professional Conduct impose a broader duty of confidentiality than simply protecting privileged communications. As Rule 1.6, Comment [3] notes:

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule,

for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Thus, confidentiality covers a broader range of considerations than the narrower attorney-client privilege. But this duty of confidentiality does not depend on whether information is privileged. Privileged or not, an attorney must keep confidential any “information relating to the representation of a client.”⁵⁵

Conclusion

Jurisdictions are split on whether attorney-client privilege attaches to communications between a corporation's attorney and its former employees. Colorado seems to align with jurisdictions that

extend privilege to former employees. But the Colorado Supreme Court has not addressed the issue in depth, so the question is unsettled. A blanket rule that the privilege does or does not apply to former employees in the same way it applies to current employees does not recognize the differences in the corporation's ability to dictate cooperation with its counsel. Nor does it account for specific factual scenarios where extension of the privilege may or may not be appropriate. Accordingly, corporate attorneys wishing to interview former employees should consider the nuanced approach taken by courts in other states. Regardless of whether the privilege applies, attorneys should also consider the broad ethical duty to protect the confidentiality of information relating to the representation and should keep in mind that the privilege is narrower than the ethical duty of confidentiality. 



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NOTES

1. This article uses “corporation” to include all types of organizations, such as corporations, LLCs, and the like. See Colo. RPC 1.13. It assumes the corporate attorney represents only the corporation and has not formed a separate attorney-client relationship with the current or former employee. See Colo. Bar Ass'n. Ethics Comm. Formal Ethics Op. 120, Representing an Organization as a Party in a Dispute, at 1 (May 2008) (“Although the organization acts through its authorized constituents such as stockholders, directors, officers, agents, and employees, the lawyer representing the organization does not automatically represent these individual constituents merely by virtue of representing the organization.”).
2. In this article, “current” and “former” refer to the employee's status at the time of the communication with the corporation's attorney. A privilege that applies to a communication with a current employee does not disappear when the employee leaves the company and becomes a former employee.
3. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981).
4. *Id.* at 392.
5. *Id.* at 391.
6. Applying *Upjohn*, the Colorado Supreme Court has explained that “the attorney-client 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.” *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Ct. For City & Cty. of Denver*, 718 P.2d 1044, 1049 (Colo. 1986) (citing *Upjohn*, 449 U.S. at 390-91).
7. *All. Const. Sols., Inc. v. Dep't of Corr.*, 54 P.3d 861, 869 (Colo. 2002).
8. *Nat'l Farmers Union*, 718 P.2d at 1049 (citing *Upjohn*, 449 U.S. at 394-95).
9. See *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 620 (7th Cir. 2010) (“[T]he conduct of [employer's] attorneys during the investigation [including an *Upjohn* warning] confirms that they were acting in their capacity as attorneys.”).



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10. See *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 334, 340 (4th Cir. 2005) (even “watered-down,” *Upjohn* warning sufficient to disclaim any attorney-client relationship between employer’s lawyer and employees).

11. *Upjohn*, 449 U.S. at 402 (Burger, C.J., concurring).

12. *Id.* at 403 (Burger, C.J., concurring) (emphasis added).

13. *Id.* at 394 n.3.

14. *Id.* at 397 n.6.

15. *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997).

16. *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

17. *In re Coordinated Pretrial Proc. in Petroleum Prod. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981).

18. *Sandra T.E.*, 600 F.3d at 621 n.4.

19. However, Colorado’s federal district court has. The judge noted the lack of Tenth Circuit authority on the issue and decided to apply the case law extending the privilege to former employees: “While the Court has not found a Tenth Circuit case discussing whether communications involving former employees of a corporation can be protected by attorney-client privilege, other circuits to address the question have ‘concluded that the distinction between present and former employees is irrelevant for purposes of the attorney-client privilege.’” *Collardey v. All. for Sustainable Energy, LLC*, 406 F.Supp.3d 977, 981 n.3 (D.Colo. 2019) (citations omitted).

20. *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo.App. 1987).

21. *Id.*

22. *All. Const.*, 54 P.3d at 866-67.

23. *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 1985 WL 2917 at *5 (N.D.Ill. Oct. 1, 1985) (mem).

24. *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1192-93 (Wash. 2016) (citing *Restatement (Third) Of Agency* § 8.11 (Am. Law Inst. 2006)).

25. *Restatement (Third) of the Law Governing Lawyers* § 73 cmt. e (Am. Law Inst. 2000).

26. *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 40 (D.Conn. 1999).

27. *Id.* at 41.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 41-42.

33. See *Winthrop Res. Corp. v. Commscope, Inc. of N.C.*, No. 5:11-CV-172, 2014 WL 5810457 at *3 (W.D.N.C. Nov. 7, 2014) (“[T]he Peralta case governs the current discovery dispute.”); *Gioe v. AT & T Inc.*, No. CV 09-4545 LDW AKT, 2010 WL 3780701 at *2 (E.D.N.Y. Sept. 20, 2010).

34. *Upjohn*, 449 U.S. at 395; *Gordon v. Boyles*, 9 P.3d 1106, 1123 (Colo. 2000).

35. See generally *Upjohn*, 449 U.S. 383; *Gordon*, 9 P.3d 1106.

36. Colo. RPC 3.4(f).

37. *E.g., Infosystems, Inc. v. Ceridian Corp.*, 197

F.R.D. 303, 306 (E.D.Mich. 2000) (“[C]ounsel’s communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witness.”).

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

39. *Id.* (quoting *Upjohn*, 449 U.S. at 393).

40. *Id.* at 1193-94.

41. *All. Const.*, 54 P.3d at 868.

42. *Denver Post Corp.*, 739 P.2d at 880.

43. *Id.* at 880.

44. *All. Const.*, 54 P.3d at 866.

45. See generally *id.*

46. *Clark Equip.*, 1985 WL 2917 at *5.

47. *Gordon*, 9 P.3d at 1123 (quoting *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992)); cf. *All. Const.*, 54 P.3d at 870 (highlighting the need to establish that the parties treated the communication as confidential).

48. *All. Const.*, 54 P.3d at 870.

49. *Id.* at 862-63, 869.

50. Colo. RPC 1.6(b), cmt. [3].

51. The privilege originated in common law, but it is codified in almost all jurisdictions. See *Losavio v. Dist. Court*, 533 P.2d 32, 34 (Colo.

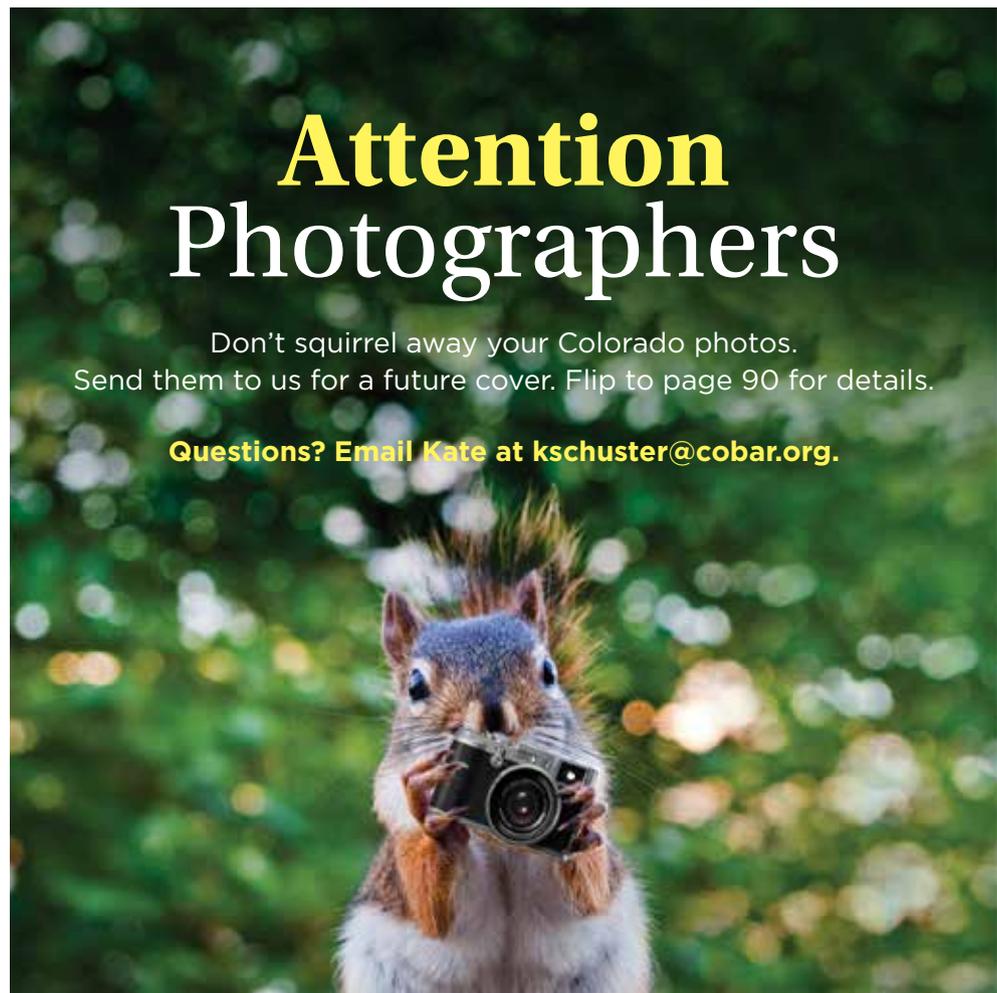
1975) (citations omitted).

52. CRS § 13-90-107(1)(b).

53. See, e.g., *Mauro v. Tracy*, 380 P.2d 570, 571-72 (Colo. 1963), cited with approval in *People v. Silvola*, 547 P.2d 1283, 1288 (Colo. 1976).

54. Colo. RPC 1.6(b) lists eight circumstances in which a lawyer is allowed but not required to disclose information relating to the representation, even if the client objects to disclosure (e.g., to prevent reasonably certain death or substantial bodily harm).

55. Colo. RPC 1.6(a). See also Colo. RPC 1.6(c) and cmts. [4] and [18].



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