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Washington High Court Curtails Businesses' Privilege Protection for Communications with Former Employees

by Angela R. Jones

In *Newman v. Highland School District No. 203*, 381 P.3d 1188 (Wash. 2016), the Washington State Supreme Court addressed an issue of first impression concerning whether the attorney-client privilege protects from disclosure a corporate counsel's communications with former employees. The divided court established a bright-line rule and held that the attorney-client privilege does not extend to a former employee's post-employment communications with the employer's counsel, even if the communications concern events that occurred during employment and the employee possesses facts crucial to the employer's defense in a lawsuit. The decision is significant for all counsel representing corporate clients in Washington and could influence courts in other states because, although many courts have protected communications between corporate counsel and their client's former employees, not all have done so.

Matthew Newman, a Highland High School football player, suffered a permanent brain injury during a game the day after he allegedly injured his head at football practice. Three years later, Newman and his parents sued Highland School District for negligence. Newman alleged that Highland's football coaches permitted him to play in the game even though he was suspected of having a concussion, in violation of statute. Highland's corporate counsel interviewed several former Highland coaches who were on staff at the school when Newman suffered his alleged injuries. During the former coaches' subsequent depositions, Newman learned that Highland's counsel had interviewed the former coaches prior to their depositions. Newman then sought discovery concerning those communications between Highland's counsel and the former coaches.[1]

Highland moved for a protective order to shield those communications from discovery on the basis of the attorney-client privilege. The superior court denied the motion and ordered Highland to disclose those communications in response to Newman's discovery requests. Highland sought discretionary review of the superior court's order, which the Washington Supreme Court granted following denial by the Washington Court of Appeals.

In a 5-4 decision authored by Justice Stephens, the Washington Supreme Court held that the attorney-client privilege does not protect from disclosure counsel's post-employment communications with former employees. The court first addressed lower court confusion and confirmed that Washington has generally adopted *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the leading United States Supreme Court decision on corporate attorney-client privilege. The attorney-client privilege attaches to communications made in confidence for the purpose of securing legal advice and in the context of an attorney-client relationship. In articulating a "flexible approach" to determining the scope of the privilege in the corporate setting, the U.S. Supreme Court held that the privilege

[1] Highland's counsel appeared on the former coaches' behalf at their individual depositions. Newman moved to disqualify Highland's counsel, asserting a conflict of interest. The superior court denied that motion, and Newman did not appeal that decision. As relevant here, Newman sought only those communications between Highland's counsel and the former coaches for the time period *before* Highland's counsel began representing the former coaches.

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extends to corporate clients and may encompass communications with lower-level employees based on a variety of factors, including whether the communications concerned matters within the scope of the employee's duties, revealed factual information necessary to inform corporate counsel's legal advice to the corporate client, and were made at the direction of management.

Despite confirming that Washington has generally adopted *Upjohn*'s "flexible approach" for determining the scope of the attorney-client privilege in the corporate setting, the Washington Supreme Court eschewed this flexible approach in favor of a bright-line rule that recognizes the privilege based on the employment status of the employee at the time of the communication. The court noted that other states have interpreted *Upjohn* differently and have held that the privilege may extend to a former employee under certain circumstances (*e.g.*, managerial employee with knowledge pertinent to litigation). The court nonetheless concluded that the "flexible approach articulated in *Upjohn* presupposed attorney-client communications taking place within the corporate employment relationship" and rejected Highland's argument that *Upjohn* supports extending the privilege to former employees. The court reasoned that "everything changes when employment ends," primarily because there is no longer a principal-agent relationship between the corporate client and the former employee. In the court's view, "a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party."

The court's bright-line rule entirely turns on the employment status of the employee at the time of the communication. Indeed, the court confirmed that any attorney-client privileged communications made *during employment* remain protected by the privilege even after employment is terminated. As the dissenting justices observed, one may question whether the majority's bright-line rule is at odds with *Upjohn*'s flexible approach otherwise embraced by the court. In any event, the result is clear: the attorney-client privilege does *not* apply to corporate counsel's post-employment communications with former employees.

Of course, former employees often possess information that is relevant, if not critical, to a case, and corporate counsel often interview former employees in order to provide legal advice to the corporate client. Although under *Newman* such communications are not privileged, they are not necessarily discoverable by the other side. First, *Newman* does not address attorney work product. Washington case law still holds that disclosure of counsel's memoranda of witnesses' oral statements is "particularly disfavored because it tends to reveal the attorney's mental processes."[2] Second, Washington Civil Rule 26(b)(5)(B) provides that for confidential, non-testifying consultants, discovery may only be had upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. This standard for discovery is difficult to meet, potentially safeguarding the opinions and even the identities of such consulting experts. To the extent former employees qualify as confidential, non-testifying consultants, post-employment communications may be protected from disclosure.[3] Third, an ongoing obligation between the former employee and the corporate client, such as a consulting or other contractual relationship, may give rise to a principal-agent relationship sufficient to support application of the attorney-client privilege under *Newman*.[4] And fourth, to the extent corporate clients are litigating in federal courts, the federal common-law privilege generally applies and may protect counsel's post-employment communications with former employees from disclosure on the basis of attorney-client privilege.[5]

Nonetheless, in light of *Newman*'s holding, cautious corporate counsel should assume that everything said to former employees may now be discoverable in lawsuits brought in Washington.

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[2] *See, e.g.*, *Soter v. Cowles Publ'g Co.*, 130 P.3d 840, 844-45 (Wash. Ct. App. 2006) (quoting *Upjohn*, 449 U.S. at 399), *aff'd*, 174 P.3d 60 (Wash. 2007).

[3] *See, e.g.*, *Detwiler v. Gall, Landau & Young Constr. Co.*, 712 P.2d 316, 319 (Wash. Ct. App. 1986).

[4] *See also In re Bieter Co.*, 16 F.3d 929, 937-38 (8th Cir. 1994) (applying *Upjohn* to cover communications between corporate counsel and outside consultant where the consultant was "in all relevant aspects the functional equivalent of an employee"); *United States v. Graf*, 610 F.3d 1148, 1159 (9th Cir. 2010) (same).

[5] *See, e.g.*, FED. R. EVID. 501; *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1493 (9th Cir. 1989).

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