Litigation Alert: Does the Attorney-Client Privilege Apply to Communications with Former Employees?

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The Washington Supreme Court recently issued an opinion holding that communications between corporate counsel and former employees are **never** privileged. The bright line test adopted in *Newman v. Highland School Dist. No. 203,* 381 P.3d 1188 (Wash. 2016) is a minority viewpoint, but it presents a good opportunity to refresh our understanding of what courts *have* said about the attorney-client privilege in the corporate context, and to revisit the privilege issues that can arise when communicating with former (or soon-to-be former) employees.

The Newman Case: No privilege over attorney communications with former employees

Newman was a personal injury action brought by a student athlete against his former school district. The student claimed to have suffered permanent brain injuries while playing high school football, and his lawyers sought to discover communications between the district's attorneys and the student's former coaches. Although several of the coaches were no longer district employees, the district claimed these communications were privileged. The trial court disagreed and denied the district's request for a protective order shielding the communications from discovery. The Washington Supreme Court granted discretionary review.

In its analysis, the *Newman* court noted that in determining whether the attorney-client privilege applies to non-managerial employees, most courts follow the U.S. Supreme Court's flexible approach in the seminal case of *Upjohn Co. v. United States,* 449 U.S. 383 (1981),. *Upjohn* draws no distinction between current and former employees; instead, it requires courts to balance a number of factors in determining whether the privilege applies, including whether the communications: (a) were at the request of management; (b) concerned issues within the scope of employment; and (c) provided factual information underpinning the legal advice.

Because *Upjohn* did not address whether the privilege applies to communications between corporate counsel and *former* employees, the *Newman* court found this specific issue to be one of first impression. Ultimately, the majority held the rationale cited in *Upjohn* for applying the privilege to current employees did

not support extending the privilege to former employees.

The Majority Rule: Privilege can apply to attorney communications with former employees in certain circumstances

Unlike *Newman,* most courts that have addressed this issue have held that communications between corporate counsel and former employees *can* be privileged, as long as the balancing test set forth in *Upjohn* and similar cases calls weighs in favor of maintaining the privilege. The reasoning behind this conclusion is outlined in *Peralta v. Cendant Corp*., 190 F.R.D. 38 (D. Conn. 1999), which many federal courts have followed. *Peralta* contains its own flexible test—namely, does the communication in question relate to the former employee's conduct, knowledge, or communication with corporate counsel while he or she was still employed? If so, the communication is protected under *Upjohn.*

The Minnesota Experience

What have Minnesota courts said on these issues? Surprisingly, very little. Sparse, older case law makes it difficult to predict how our courts would rule if presented with a situation like *Newman*.

In *Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W. 2d 305 (Minn. 1981), for example, the Minnesota Supreme Court recognized the 8th Circuit's adoption of a flexible test very similar to *Upjohn*, but it did not formally adopt an *Upjohn*-like test, and the actual holding of *Leer* was quite strict from an attorney-client client privilege perspective. In *Leer*, the court held there was no privilege over witness statements provided by current railroad employees to their employer the day after an accident. In reaching its conclusion, the court balanced two competing policy interests—the liberal construction of discovery rules vs. promoting open and honest discussion between clients and their attorneys—and discovery won. The court noted that because the attorney-client privilege tends to suppress the truth, it must be strictly construed. Interestingly, this is the same rationale that motivated the *Newman* court to rule that no privilege applies to communications between corporate counsel and former employees.

Thinking about how Minnesota courts might rule if presented with a *Newman*-like situation underscores the significance of a strong working relationship between inside and outside counsel and raises some practical implications for communications between counsel and company employees. For example:

- If the attorney-client privilege ends at termination of employment, then the exit interview becomes even more important. In a litigious setting, this means counsel should be involved.

- If the soon-to-be ex-employee has privileged information that belongs to the company, *those communications remain privileged.* In the exit interview, the employee should be reminded of the privileged information and their continuing duty not to disclose it, particularly if contacted by an adversary.

- May counsel for the corporation also represent the ex-employee in a deposition? This would ensure that communications with the ex-employee can be protected by the privilege, but such may not be appropriate under ethical rules, given the nature of the dispute.

- If a corporation decides that it is appropriate for its outside counsel to represent the former employee in a deposition, it must remember that *the outside lawyer should not solicit the representation.* However, inside counsel may reach out to the former employee and talk about representation options, and the availability of representation post-employment is an appropriate topic to raise during an exit interview.

- Can the ex-employee be retained as a representative or consultant of the company? While this has potential for abuse, it might be a legitimate need in some situations and is something you should discuss with outside counsel if you believe it could be appropriate.

- Finally, remember that if having the company's lawyer represent the ex-employee is not ethical or desired, anything that the ex-employee says to company counsel may be discoverable. While a strong inside counsel can go a long way in engendering loyalty with ex-employees, inside and outside counsel still should be cautious in their communications with former employee. As the Washington court noted in *Newman*, former employees may be no different than any other third party to the litigation, and they certainly no longer owe the same sorts of duties or loyalties to the company.