Washington Supreme Court Limits the Application of the Attorney Client Privilege

Newman v. Highland Sch. Dist. No. 203, Case No. 90194-5 in the Washington Supreme Court

Prior to the Newman opinion, Washington had not directly addressed the question of whether a privilege attaches to the communications of an attorney representing a corporate client and a former employee who's acts or omissions could have implications on the liability of the corporation. While Washington courts had not directly addressed the issue, the 9th Circuit and other federal courts had. In *In re Coordinated Pretrial Proceedings*, 658 F.2d 1355 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982), the 9th Circuit stated:

> Although *Upjohn* was specifically limited to current employees, the same rationale applies to the ex-employees (and current employees) involved in this case. 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. Again, the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves.

See also, Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005) (citing *Surles v. Air France*, No. 00-Civ.-5004, 2001 U.S. Dist. LEXIS 10048, at *17-18 (S.D.N.Y. July 19,2001)) ("[v]irtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment.") The issue for the federal courts that have extended the privilege was when the relevant conduct occurred, not when the information or discussions with counsel happened.

The Washington Supreme Court has now specifically rejected the application of the attorney-client privilege to communications with the former employees. In doing so, it did not address the trial courts order disqualifying counsel for the corporation from representing the former employees. It did, however, order the court ordered production of all communications with former employees and the corporate counsel after the time the employment ended.

In rejecting the 9th circuit approach and limiting the application of *Upjohn Co. v. United States*,449U.S. 383, 394n.3, 101 S. Ct. 677,66 L. Ed. 2d 584 (1981), The Court stated

> Highland argues the flexible approach to protecting privileged communications recognized in *Upjohn* supports extending the privilege to postemployment communications with former employees. We disagree. Because we conclude *Upjohn* does not justify applying the attorney client privilege outside the employer-employee relationship, the trial court properly denied Highland a protective order to shield from Discovery Communications with former coaches who are otherwise fact witnesses in this litigation.

The case specifically accepts and through dicta that its decision does not diminish the long standing and well recognized doctrine that a "durable privilege" exists for communications that occur *during* employment. *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999) (concluding any privileged information obtained during employment remains privileged upon termination of employment).

While Court did not address whether the disqualification of counsel for the corporation as attorneys for the former employees was acceptable, its rejection of the 9th Circuit positon in, *In re Coordinated Pretrial Proceedings* (where the Court rejected the trial courts disqualification of corporate counsels representation of former employees) under factually similar circumstances, makes such a practice suspect. At this time, it would appear that co-representation of a corporation and its former employees for deposition and deposition preparations is risky.

Given this opinion, the natural question arises as to how you address the interviewing, preparation and representation of former employees. While not a solution in every instance, the *Broyles v. Thurston Cty.*, 147 Wash. App. 409, 442, 195 P.3d 985, 1002 (2008); decision provides one potential solution. In that case, Thurston County objected to the trial courts exclusion of evidence detailing a meeting between the plaintiffs and another attorney. The Court of appeals upheld the trial court's order finding that:

> Under the "common interest" rule, "communications exchanged between multiple parties engaged in a common defense remain privileged under the attorney-client privilege."

Broyles v. Thurston Cty., 147 Wash. App. 409, 442, 195 P.3d 985, 1002 (2008), *citing C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wash.2d 699, 716, 985 P.2d 262 (1999)*. As such, and where practically possible, if counsel for a former employee can be retained to represent the former employees, it may be possible to assert a common interest in a joint defense that would allow for communications to remain privileged.