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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Appeal from the Court of Appeals – Division III

No. 32223-8 III

Yakima County Superior Court Cause No. 12-2-03162-1

MATTHEW A. NEWMAN, an incapacitated adult; and RANDY
NEWMAN AND MARLA NEWMAN, parents and guardians of said
incapacitated adult,

Respondent,

v.

HIGHLAND SCHOOL DISTRICT NO. 203, a Washington State
government agency,

Petitioner.

**HIGHLAND SCHOOL DISTRICT'S ANSWER TO BRIEF OF
AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS
ASSOCIATION**

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I. INTRODUCTION

The Washington Employment Lawyers Association (“WELA”) requests that this Court address two issues. First, WELA requests that this Court adopt a bright line test that after the termination of employment, communications between corporate counsel and former corporate employees, who are no longer agents for the corporation, are not privileged. Second, WELA encourages this Court to address the appropriateness of the District’s counsel’s representation of certain former employees of the District for the limited purpose of the former employee’s depositions. As for the second issue, it is not properly before this Court, and therefore, the District respectfully requests that this Court decline to address it.

II. ARGUMENT

A. A Modified Version of the *Upjohn* Test in the Context of the Newman Case Making Attorney Communications With Former Corporate Employees Confidential Furthers the Purpose of the Corporate Attorney-Client Privilege and Is Consistent with the Legal Limitations Inherent in the Privilege.

As addressed in the District’s Amended Petitioner’s Brief, Petitioner’s Reply Brief, and Petitioner’s Answer to Brief of Amicus Curia WSAJF, a modified version of the *Upjohn* test should be adopted with respect to whether to extend the corporate attorney-client privilege to

corporate counsel's communications with former corporate employees. For the reasons stated therein, the bright line test also advocated by WELA should be rejected.

The other arguments of WELA related thereto also are without merit. For example, WELA incorrectly states the holding of the Ninth Circuit's *Admiral* decision. (Brief of Amicus Curiae Washington Employment Lawyers Association at 7, No. 90194-5 (Review Granted August 26, 2014)). The Ninth Circuit clearly has held that the *Upjohn* rationale necessarily extended the privilege to former corporate employees: In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, the Ninth Circuit stated:

Although *Upjohn* was specifically limited to current employees, 101 S.Ct. at 685, n.3, 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. See *id.*, at 683.

(*In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 658 F.2d 1355, 1361 (9th Cir. 1981). Similarly, in *Admiral Ins. Co. v. U.S. District Court for the District of Arizona*, the Ninth Circuit stated:

In finding that the *Upjohn* rationale necessarily extended the privilege to former corporate employees, we stated: "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.” 658 F.2d at 1361 n. 7.⁶

(*Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1493 (9th Cir. 1989)).¹

WELA contends that the District’s concern over the application of “differing standards” is a “non-starter.” (Amicus Brief at 6). In making this contention, WELA either ignores or is unaware of the situation where such differing standards with respect to the application of the corporate attorney-client privilege to communications with former employees could arise, i.e., where the lawsuit against a municipal corporation filed in state court includes allegations that raise a federal question. It is in this context that a case can be removed to federal court. It is in this context that differing standards as to the confidentiality of communications with former District employees could arise.

WELA advocates that corporate counsel will misuse the corporate attorney-client privilege if extended to former employees by engaging in inappropriate conduct with respect to these witnesses. WELA misconstrues the nature of the attorney-client privilege, which applies whether an attorney represents an individual, a partnership, a criminal

¹ Even *Admiral’s* footnote six undercut’s WELA’s argument, because the Ninth Circuit emphasized that furthering the policy underlying the privilege is more important than creating bright line rules. (*Id.* at 1493 n.6)(stating “*Upjohn* rejected a mechanistic approach to applications of the corporate-attorney-client privilege in the corporate context.”).

defendant, or a corporation who is a plaintiff instead of a defendant. Inherent in each of these attorney-client scenarios is the risk that counsel, whether it be personal counsel, or corporate counsel, or otherwise, will engage in obstruction of discovery, insidious coaching, subterfuge, or any other ethically troublesome practice. Despite that risk, the privileges exist because the benefits of the privileges outweigh such risk. (See *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); *Youngs v. Peacehealth*, 179 Wn.2d 645, 316 P.3d 1035 (2014)). Consequently, such a risk does not justify creating a bright line test any more than it justifies not having the privilege at all.

B. The Propriety of Corporate Counsel Representing Former Employees Is Not An Issue in This Appeal

In its Objection to the Motion of Washington Employment Lawyer's Association to File Amicus Curiae Brief, the District argued that WELA has improperly attempted to interject an issue into the District's appeal not raised by either of the parties. As discussed in the District's Objection, "[a]ppellate courts will not usually decide issues raised only by amicus . . ." (*Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, n. 1, 943 P.2d 1378 (1997)(citing *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984))). Here, WELA has improperly raised the new issue of the propriety of District counsel representing certain former employees for the purposes of their depositions. (Amicus Brief at 2).

The only issue on appeal by the parties to the Newman case is the application of the District's corporate attorney-client privilege to some, but not all, of the communications between District counsel and the District's former employees. (CP 68-70). The District appealed the trial Court's Decision on Issue of Possible Attorney-Client Privilege with Former Employees of Defendant and Other Discovery Matters. (*Id.*). This Decision incorrectly denied the application of the District's corporate attorney-client privilege to its counsel's communications with its former employees.

The trial court's order regarding the District's counsel's representation of the former employees, for the purposes of their deposition, is not on appeal. On September 27, 2012, the trial court ruled that counsel for the District was thereafter prohibited from representing non-employee witnesses. (CP 635-37). The trial court did not find there was conflict of interest, but nevertheless, ordered the District's counsel to refrain from representing non-employee witnesses for the purpose of their depositions. (*Id.*).

Neither party sought review of this ruling. In fact, the plaintiffs have acknowledged that the order "is not challenged on appeal." (Respondents' Brief at 11). If the order is not challenged on an appeal, then it is not an issue in this appeal. It also has not been adequately

developed by the parties and is not ready to be decided by this Court. (*See Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994)(Washington courts do not give advisory opinions)).

Despite the fact that the issue is not on appeal, WELA raised it, and, the District must respond. In this case, the plaintiffs allege that the acts and omissions of the District's former employees constitute negligence. Such an allegation alone does not create a conflict. Under the facts of this case, it simply creates a potential for their former employer to be held vicariously liable for their actions while employed thereby. Under the Rules of Professional Conduct, a concurrent conflict of interest occurs when

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(RPC 1.7(a)). Here, the trial court did not find that there was a conflict of interest. (CP 635-637). The trial court simply did not like the idea of the District's counsel representing the former employees for the purpose of their depositions and issued an order that such representation could not continue. Notably, the trial court did not order that the privileged

communications between the District's counsel and the former employees were discoverable.

Neither the plaintiffs nor the District appealed this order by the trial court. As such, the sole issue on appeal is whether District counsel's communications with former corporate employees that occurred during the time period where the former employees were not represented by the District's counsel are discoverable. This issue has nothing to do with whether joint representation, which was not improper in and of itself, constituted a conflict of interest under the facts of this case. Had the former employees been sued individually, there are no actual facts in this case which would constitute a conflict of interest prohibiting District counsel from jointly representing the former employees and the District under such a scenario. (*See* RPC 1.7).

C. WELA Inappropriately Implies All Corporate Defense Counsel Are Unethical.

WELA begins its argument with the presumption that corporate counsel will act unethically and engage in the "intentional or insidious coaching of the former employees." (Amicus Brief, *supra*, at 4). In addition to asserting corporate counsel are engaged in unethical behavior, WELA argues, "Corporations have misused the attorney-client privilege to hide damaging facts." (*Id.* at 18 (citations omitted)). For these reasons,

WELA apparently believes that all corporate defendants should not be entitled to the attorney-client privilege, contrary to the holdings in *Upjohn* and *Youngs*, let alone that the attorney-client privilege should be extended to former employees of the corporation. As a friend of the court, one would have hoped that WELA's analysis would be more helpful to this Court, instead of merely engaging in the baseless attacking of corporate counsel to veil the lack of substance to their arguments.

It is uncertain why WELA believes that only corporate lawyers engage in such unethical behavior. Is it because corporate lawyers, who presumably are paid by the hour or receive a salary for their work, or potentially face termination of their employment should a legal outcome be unfavorable, have such a personal interest in the outcome of their client's case that they throw out all semblance of professional and ethical behavior to ensure a favorable outcome for their client? If so, then using WELA's incentive logic, one could certainly make the same presumption with respect to all attorneys, including some or all of the members of WELA, who represent injured parties and who are paid for their efforts by way of a contingent fee. According to WELA's logic, it must be the case that all plaintiff attorneys who get paid for their work on behalf of their clients have a significant monetary interest in the outcome of their client's

case and therefore will engage in the same unprofessional and unethical behavior attributed to corporate attorneys.

Notwithstanding WELA's belief as to the motives of all corporate counsel, and by logical extension, all plaintiff attorneys, it is fortunate that this Court does not start its analysis of either the existence of the attorney-client privilege or its application to corporate clients with such presumptions. For if it did, then the privilege simply would not exist in Washington, or for that matter ever exist in the common law, for fear of such inappropriate behavior by either or both personal counsel or corporate counsel.

Here, District's counsel's representation of the District's former employees was for the same purpose that the attorney-client privilege exists in the first place. That is, such representation allowed for full and frank communications regarding the facts and actions of those former employees unimpeded by the prospect of opposing counsel discovering the substance of such communications. The purpose also was to provide legal advice to the former corporate employees relative to their upcoming depositions and to assist them in understanding the nature of the proceedings. Consistent with Washington law, at no time were the Newmans' attorneys ever prevented by counsel from receiving answers to questions that properly sought discovery of the facts of the case.

WELA also accuses the District's counsel of attempting to circumvent the trial court's ruling prohibiting counsel from representing former employees. This accusation also is unfounded. The trial court never ordered that the communications with the coaches while they were represented by District counsel were to be disclosed. The trial court only ordered that communications during the time periods where the former employees were not represented by counsel were to be disclosed to the Newmans' attorneys. It is this order of the trial court that is the sole subject of the parties' appeal.

D. From a Practical Standpoint, It Makes Sense to Extend the Corporate Attorney-Client Privilege to Former Employees in Certain Circumstances.

The plaintiffs and the Amici Curiae repeatedly have decried the application of the corporate attorney-client privilege to former corporate employees. Yet, one must ask whether these attorney associations, whose members responsibly represent the interests of injured parties, would make the same arguments they have urged herein should the tables be turned.

For instance, a law firm, one or more of whose members' practice involves the representation of injured persons, is sued for the malpractice of a former senior associate, who is not named as a defendant. In this hypothetical, the former senior associate has substantial knowledge of many, if not most, of the facts underlying the allegations set forth in the

plaintiff's malpractice lawsuit. Under this potentially very real hypothetical, it is unimaginable that the attorneys who are still shareholders or members of a comparable legal structure and who have a personal monetary stake in the outcome of the litigation given their ownership thereof, would ever argue that the communications between their corporate defense counsel and their former employee, let alone themselves, should be disclosed to the attorney for their former client who is now suing them for malpractice.

It also is unimaginable that they would seriously agree that their counsel, who would necessarily be a "corporate" counsel, was obstructing discovery or engaging in insidious coaching, subterfuge, or other ethically troublesome practices. If the table was turned, such allegations would not only cast aspersions upon their corporate defense attorney but also upon themselves, because the additional assumption is that they, i.e., the client, and their former employee, would go along with such insidious "coaching" and subterfuge and potentially perjure themselves accordingly.

III. CONCLUSION

For the above reasons, the District requests this Court adopt a flexible modified version of the *Upjohn* test extending the attorney-client privilege to communications between the District's counsel and its former employees. The District also requests that this Court refrain from

addressing the issue of the concurrent representation by District counsel of
the District's former employees for the purposes of their depositions.

RESPECTFULLY SUBMITTED this 4^h day of November, 2015.

NORTHCRAFT, BIGBY & BIGGS, P.C.



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CERTIFICATE OF SERVICE

I, Michelle A. Tomczak, declare under penalty of perjury of the state of Washington, that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within-entitled cause. I am an employee of Northcraft, Bigby & Biggs, P.C., located at 819 Virginia Street, Suite C-2, Seattle, WA 98101.

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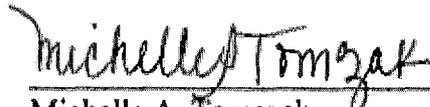
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Attached for the Court's consideration, please find:

1. Highland School District No. 203's Answer to the Brief of Amicus Curiae American Civil Liberties Union of Washington;
2. Highland School District No. 203's Answer to the Brief of Amicus Curiae Washington Employment Lawyers Association; and
3. Highland School District No. 203's Answer to the Brief of Amicus Curiae Washington State Association for Justice Foundation.

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