

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 28, 2015, 8:41 am
BY RONALD R. CARPENTER
CLERK

No. 90194-5

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

vs.

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

Defendant/Petitioner.

Filed *E*
Washington State Supreme Court
OCT 13 2015
Ronald R. Carpenter
Clerk *by h*

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

George M. Ahrend
WSBA No. 25160
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Bryan P. Harnetiaux
WSBA No. 5169
517 E. 17th Ave.
Spokane, WA 99203
(509) 624-3890

On Behalf of
Washington State Association for Justice Foundation



ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUE PRESENTED	4
IV. SUMMARY OF ARGUMENT	4
V. ARGUMENT	6
A. Overview Of The Attorney-Client Privilege In The Discovery Context, And Requirements Governing Invocation Of The Privilege By Corporations.	7
B. The Corporate Attorney-Client Privilege Should Not Cover <i>Post-Employment</i> Communications Between A Corporation's Lawyer And Its Former Employees Because The Employment Relationship Has Been Terminated.	11
VI. CONCLUSION	20
Appendix	

TABLE OF AUTHORITIES

Cases	Page
<u>Admiral Ins. Co. v. United States Dist. Court,</u> 881 F.2d 1486 (9 th Cir. 1989)	16-18
<u>Barfield v. Seattle,</u> 100 Wn. 2d 878, 676 P.2d 438 (1984)	7
<u>Bushman v. New Holland Div. of Sperry Rand Corp.,</u> 83 Wn. 2d 429, 518 P.2d 1078 (1974)	7
<u>Cedell v. Farmers Ins. Co. of Wash.,</u> 176 Wn. 2d 686, 295 P.3d 239 (2013)	7-8
<u>Chicago Title Ins. Co. v. Washington St. Office of Ins.</u> <u>Comm’r,</u> 178 Wn. 2d 120, 309 P.2d 372 (2013)	13
<u>Cogan v. Kidder, Matthews & Segner, Inc.,</u> 97 Wn. 2d 658, 648 P.2d 875 (1982)	13
<u>Coordinated Pretrial Proceedings in Petroleum Prods.</u> <u>Antitrust Litig.,</u> 658 F.2d 1355 (9 th Cir. 1981), <i>cert. denied,</i> 455 U.S. 990 (1982)	16-18
<u>Dietz v. Doe,</u> 131 Wn. 2d 835, 935 P.2d 611 (1997)	8-9, 14
<u>Dike v. Dike,</u> 75 Wn. 2d 1, 448 P.2d 490 (1968)	9
<u>Hangartner v. City of Seattle,</u> 151 Wn. 2d 439, 90 P.3d 26 (2004)	9
<u>Heidebrink v. Moriwaki,</u> 104 Wn. 2d 392, 706 P.2d 212 (1985)	8
<u>Infosystems, Inc. v. Ceridian Corp.,</u> 197 F.R.D. 303 (E.D. Mich. 2000)	13-14, 16

<u>In Re Allen,</u> 106 F.3d 582 (4 th Cir. 1997)	17-18
<u>Lowy v. PeaceHealth,</u> 174 Wn. 2d 769, 280 P.3d 1078 (2012)	8
<u>Mersky v. Multiple Listing Bureau of Olympia, Inc.,</u> 73 Wn. 2d 225, 437 P.2d 897 (1968)	13
<u>Morgan v. City of Federal Way,</u> 166 Wn. 2d 747, 213 P.3d 596 (2009)	8
<u>Newman v. Highland Sch. Dist.,</u> 180 Wn. 2d 1031, 332 P.3d 985 (2014)	4
<u>Pacific Title, Inc. v. Pioneer Nat'l Title Ins. Co.,</u> 33 Wn. App. 874, 658 P.2d 684, <i>review denied</i> , 99 Wn. 2d 1020 (1983)	14, 17
<u>Pappas v. Holloway,</u> 114 Wn. 2d 198, 787 P.2d 30 (1990)	9, 19
<u>Peralta v. Cendant Corp.,</u> 190 F.R.D. 38 (D. Conn. 1999)	16
<u>Schmidt v. Coogan,</u> 181 Wn. 2d 661, 335 P.3d 424 (2014)	15
<u>Shaffrath v. Hamburg Twp.,</u> 2009 WL 56031 (E.D. Mich., Jan. 8, 2009)	13
<u>State v. Allen S.,</u> 98 Wn. App. 452, 989 P.2d 1222, <i>review denied</i> , 140 Wn. 2d 1022 (2000)	8
<u>United States v. Chen,</u> 99 F.3d 1495 (9 th Cir. 1996)	16-18
<u>United States v. Ruehle,</u> 483 F.3d 600 (9 th Cir. 2009)	10

<u>Upjohn v. United States</u> , 449 U.S. 383 (1981)	passim
<u>Wright v. Group Health Hosp.</u> , 103 Wn. 2d 192, 691 P.2d 564 (1984)	6
<u>Youngs v. Peacehealth</u> , 179 Wn. 2d 645, 316 P.3d 1035 (2014)	6, 8-10, 12, 19

Statutes and Rules

CR 26(b)(1)	7
ER 401-402	7
RCW 5.60.060	8
RCW 5.60.060(2)	1
RCW 5.60.060(2)(a)	8
RCW 28A.600.190	2
RPC 1.13	7, 11
RPC 4.1-4.4	11

Other Authorities

3A Karl B. Tegland, Wash. Prac., Rules Practice CR 26 (6 th ed.)	8
Grace M. Giesel, <u>Upjohn Warnings, The Attorney-Client Privilege, And Principles of Lawyer Ethics: Achieving Harmony</u> , 65 U. Miami L. Rev. 109 (Fall 2010)	11
Merriam-Webster Online (viewed Sept. 27, 2015)	19

Restatement (Second) of Agency § 381 (1958)	13, 15
Restatement (Third) of Agency § 8.11 (2006)	13
Restatement (Third) of the Law Governing Lawyers § 73 (2000)	15-16

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation has an interest in the rights of plaintiffs under the civil justice system, including an interest in the scope of discovery under the *Civil Rules*, and limits on discovery resulting from application of the attorney-client privilege, RCW 5.60.060(2).

II. INTRODUCTION AND STATEMENT OF THE CASE

This review presents questions regarding whether the attorney-client privilege precludes discovery of post-employment communications between the lawyer for a corporate defendant and former employees of the corporation who have knowledge of facts related to a lawsuit or for whose conduct the corporation is potentially subject to vicarious liability. These questions arise in a lawsuit brought by Matthew Newman, and his parents and legal guardians, Randy and Marla Newman (Newman), against Highland School District No. 203 (Highland), in Yakima, Washington, for injuries sustained by Matthew while playing in a high school football game.

The underlying facts are drawn from the briefing of the parties and the superior court's discovery order that is the subject of this review. See

Highland Amended Br. at 2-11; Newman Br. at 4-12; Highland Reply Br. at 1-6; CP 81-83 (“Court’s Decision on Issue of Possible Attorney-Client Privilege with Former Employees of Defendant, and Other Discovery Matters,” dated Jan. 28, 2014).¹ For purposes of this amicus brief, the following facts are relevant.

Newman alleges that Highland’s football coaches were negligent and violated the Lystedt law, RCW 28A.600.190, in returning him to play without proper medical clearance after a possible concussion, and in failing to remove him from a game after he showed signs and symptoms of concussion. One of the key contested issues in the case is the knowledge of the coaches about Matthew’s possible concussion, and the degree to which testimony regarding such knowledge may have been influenced by lawyers on both sides of the case. Several of the coaches involved in the events leading to this litigation are no longer employed by Highland, and they are not named as defendants in this action.

Initially, Newman’s lawyers questioned these coaches during their depositions about communications with Highland’s lawyers. The lawyers objected, contending that they represented the coaches *individually*, and that such communications were protected by the attorney-client privilege. However, the superior court ruled that Highland’s lawyers could not

¹ A copy of the superior court order is reproduced in the Appendix to this brief.

represent the former employees individually, and that ruling is not at issue in this review. See Newman Br. at 10-11.

Next, Newman served interrogatories and requests for production seeking communications between Highland's lawyers and employees of Highland, including communications with several of the coaches no longer employed by the school district. See Highland Amended Br. at 7. Newman also subpoenaed documents from two former coaches, including documents relating to their communications with Highland's lawyers. See id. In response, Highland sought a protective order on grounds that the communications sought by Newman were protected by the *corporate attorney-client privilege* between defense counsel and the school district because the former employees had knowledge of the facts and the school district was potentially subject to vicarious liability for their conduct.²

The superior court denied Highland's motion for a protective order as to post-employment communications between Highland's lawyers and former employees of the school district. See CP 81-83.³ Highland filed a

² It does not appear that Highland claimed work product protection for its lawyers' communications with former employees. Apparently, a separate superior court order addresses discovery of work product. See CP 83 (stating "[t]his ruling does not change the prior ruling regarding discoverability of work product, such as statements taken from witnesses").

³ Although Newman's discovery requests seem broader than the superior court's order, it appears that Newman narrowed the requests at some point before the lower court issued its order. See Highland Amended Br. at 7 (describing discovery requests); Newman Br. at 12 (stating Newman limited the request to communications occurring during the period of time when the coaches in question were unrepresented by counsel); CP 81 (superior court

motion for discretionary review of the superior court order in the Court of Appeals, Division III. The appellate court commissioner denied Highland's motion, and a panel of the court subsequently denied a motion to modify the commissioner's ruling. Highland then sought discretionary review in this Court, which was granted. See Newman v. Highland Sch. Dist., 180 Wn. 2d 1031, 332 P.3d 985 (2014).

III. ISSUE PRESENTED

Is discovery of communications between the lawyer for a corporate defendant and former employees of the corporation, occurring after the end of their employment, barred by the corporate attorney-client privilege?

See Highland Amended Br. at 2; Newman Br. at 3.⁴

IV. SUMMARY OF ARGUMENT

The attorney-client privilege should not bar discovery of communications between a corporation's lawyer and former employees of a corporation occurring after the end of their employment. While a corporation can only act through its employees and other agents, a former employee is no longer able to act on behalf of the corporation. In this way, former employees cannot be considered part of the corporate "client" for

order stating "[i]n discovery, plaintiffs sought disclosure of communications between defense counsel and former employees made after the employment ended and not during the time defense counsel claims to have represented the former employees for purposes of their depositions").

⁴ The parties also address whether Highland waived the corporate attorney-client privilege by asserting it only after its lawyers were disqualified from representing former employees of the corporation individually, and whether Highland is liable for Newman's attorney fees. This brief does not address these issues.

purposes of the attorney-client privilege, because they have no general duty to provide information to the corporation or its lawyer after the end of their employment. Furthermore, communications by corporate counsel with former employees cannot be considered confidential, as required to invoke the attorney-client privilege, because former employees generally have no duty to maintain the confidentiality of information received after the end of their employment.

With respect to post-employment communications, former employees are no different than any other third-party witness who may have facts relevant to a lawsuit or for whose conduct a corporation may potentially be liable, such as an apparent agent. There is nothing that prevents corporate counsel from communicating with former employees and other third-party witnesses on an ex parte basis, or otherwise conducting fact discovery necessary to render informed advice to the corporation. However, to the extent these communications take place outside of formal discovery procedures, they should be subject to discovery by others. Extending the privilege to such communications, which hinders discovery of otherwise relevant information, is unnecessary. Not extending the privilege should have the salutary effect of encouraging counsel to avoid conduct that might be perceived as an attempt to influence witness recollection or testimony.

V. ARGUMENT

Introduction

The parties seem to agree that this Court has not addressed the issue of whether the corporate attorney-client privilege extends to post-employment communications with former employees. However, the parties disagree whether the framework for analyzing the corporate attorney-client privilege developed by the U.S. Supreme Court in Upjohn v. United States, 449 U.S. 383 (1981), is applicable here. Highland contends that this Court adopted Upjohn in Youngs v. Peacehealth, 179 Wn. 2d 645, 316 P.3d 1035 (2014), and urges this Court to follow federal precedent that has extended Upjohn to communications with former employees. See Highland Amended Br. at 15-18.⁵

Newman claims that this Court has never expressly adopted Upjohn, and argues that the “client” for purposes of the attorney-client privilege does not include former employees. See Newman Br. at 20-21 & n.6. In making this argument, Newman primarily relies on Wright v. Group Health Hosp., 103 Wn. 2d 192, 195-202, 691 P.2d 564 (1984), which defines a represented corporate “party” under former Canon of Professional Responsibility (CPR) DR 7-104(A)(1) to consist of currently

⁵ This question is left unresolved in Upjohn. See 449 U.S. at 394 n.3. A lone concurrence proposes a general rule that would include former employees within the ambit of the corporate attorney-client privilege. See id. at 403 (Burger, C.J., concurring).

employed managing-speaking agents of a corporation.⁶ This brief assumes for the purposes of argument that Upjohn provides the applicable framework for resolving the issue before the Court.

A. Overview Of The Attorney-Client Privilege In The Discovery Context, And Requirements Governing Invocation Of The Privilege By Corporations.

Parties may obtain discovery regarding any unprivileged matter that is relevant to the subject matter involved in the pending action. See CR 26(b)(1). It is not grounds for objection that the information sought would be inadmissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence. See id.

Relevance for purposes of discovery is much broader than it is for purposes of admissibility at trial under ER 401-402, encompassing all information that is potentially relevant. See Barfield v. Seattle, 100 Wn. 2d 878, 886, 676 P.2d 438 (1984). Potential relevance is determined with respect to the general subject matter of the pending action, as distinguished from the specific issues raised by the pleadings. See Bushman v. New Holland Div. of Sperry Rand Corp., 83 Wn. 2d 429, 434, 518 P.2d 1078 (1974). The broad right to discovery is an integral part of the constitutional right of access to courts. See Cedell v. Farmers Ins. Co.

⁶ The parallel provision in the current *Rules of Professional Conduct* is RPC 1.13.

of Wash., 176 Wn. 2d 686, 695, 295 P.3d 239 (2013); Lowy v. PeaceHealth, 174 Wn. 3d 769, 776-77, 280 P.3d 1078 (2012).⁷

A party claiming that otherwise discoverable information is exempt from discovery on grounds of the attorney-client privilege has the burden of establishing entitlement to the privilege. See Dietz v. Doe, 131 Wn. 2d 835, 843-44, 935 P.2d 611 (1997). The attorney-client privilege protects confidential communications between lawyer and client from disclosure. See RCW 5.60.060(2)(a).⁸ To qualify for the privilege, the communications must have been made in confidence, in the context of an attorney-client relationship. See Morgan v. City of Federal Way, 166 Wn. 2d 747, 755-57, 213 P.3d 596 (2009).

The purpose of the attorney-client privilege is to encourage the client to communicate freely with the lawyer, and thereby foster a relationship deemed to be socially desirable. See Heidebrink v. Moriwaki, 104 Wn. 2d 392, 404, 706 P.2d 212 (1985); see also Youngs, 179 Wn. 2d at 650 (stating the aim of the privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote

⁷ The right to discovery generally includes discovery of impeachment evidence. See 3A Karl B. Tegland, Wash. Prac., Rules Practice CR 26, note 5 (6th ed.); see also ER 801(d)(1)(ii) (recognizing witness testimony may be impeached by evidence of “improper influence,” and allowing prior consistent statement for rehabilitation purposes); State v. Allen S., 98 Wn. App. 452, 470 & n.76, 989 P.2d 1222 (1999) (stating that a party may impeach a witness by showing that the “witness has been influenced by those around him or her”), *review denied*, 140 Wn. 2d 1022 (2000).

⁸ The full text of the current version of RCW 5.60.060 is reproduced in the Appendix to this brief.

broadier public interests in the observance of law and administration of justice”); internal citation omitted).

However, “[b]ecause the privilege sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists.” Pappas v. Holloway, 114 Wn. 2d 198, 203-04, 787 P.2d 30 (1990) (brackets added; citing Dike v. Dike, 75 Wn. 2d 1, 11, 448 P.2d 490 (1968)); accord Dietz, 131 Wn. 2d at 843 (citing Dike for similar proposition); see also Hangartner v. City of Seattle, 151 Wn. 2d 439, 452, 90 P.3d 26 (2004) (describing the privilege as “narrow”).

Under Upjohn, corporations are entitled to invoke the attorney-client privilege for confidential communications between corporate counsel and upper-level management (the “control group”), and, under certain circumstances, mid-level or even lower-level employees. See Upjohn, 449 U.S. at 390-91; Youngs, 179 Wn. 2d at 661. Upjohn justifies extension of the privilege to mid- and lower-level employees on grounds that they may be the only source of information relevant to legal advice, or because they may subject the corporation to legal liability as a result of their actions. See Youngs at 662. While Upjohn does not articulate a fixed

rule, factors considered in determining whether communications with mid- and lower-level employees were privileged included:

- (1) they were made at the direction of corporate superiors,
- (2) they were made by corporate employees,
- (3) they were made to corporate counsel acting as such,
- (4) they concerned matters within the scope of the employee's duties,
- (5) they revealed factual information "not available from upper-echelon management,"
- (6) they revealed factual information necessary "to supply a basis for legal advice,"
- (7) the communicating employee was sufficiently aware that he was being interviewed for legal purposes, and
- (8) the communicating employee was sufficiently aware that the information would be kept confidential.

Youngs at 664, n. 7 (citing & quoting Upjohn, 449 U.S. at 394).

Although communications with mid- and lower-level employees may be privileged under the foregoing circumstances, the privilege belongs to the corporation, and the information may be used or the privilege may be waived by the corporation to the detriment of the employee, potentially necessitating what is described as an "*Upjohn* warning" or "corporate *Miranda* warning" from corporate counsel to the employee. See United States v. Ruehle, 583 F.3d 600, 604 n.3 (9th Cir. 2009). The court in Ruehle explains:

Such warnings make clear that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company's attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure.

583 F.3d at 600 n.3 (citing Upjohn); see also Grace M. Giesel, Upjohn Warnings, The Attorney-Client Privilege, And Principles of Lawyer Ethics: Achieving Harmony, 65 U. Miami L. Rev. 109, 110-12 (Fall 2010) (noting employees' confusion about the role of corporate lawyers, and disincentive for lawyers to clearly explain their role in order to obtain employees' cooperation); RPC 1.13 cmts. 10 & 11 (regarding duty of corporate counsel to warn corporate constituents about potential conflict of interest, need for independent counsel, and limits of privilege); cf. RPC 4.1-4.4 (regarding interactions with persons other than clients).

Against this backdrop, the question to be addressed is whether the attorney-client privilege extends to communications between corporate counsel and *former* employees.

B. The Corporate Attorney-Client Privilege Should Not Cover *Post-Employment* Communications Between A Corporation's Lawyer And Its Former Employees Because The Employment Relationship Has Been Terminated.

Highland principally asserts that the corporate attorney-client privilege should extend to its former coaches because it is their alleged acts or omissions that give rise to this lawsuit. See Highland Amended Br. at 1, 19, 23. This argument should be rejected as inconsistent with both the narrow application and underlying purposes of the privilege.

While Upjohn extends the corporate attorney-client privilege to mid- and lower-level employees under certain circumstances, the approach is still client-centered and designed to foster the relationship between corporate counsel and the corporate client:

The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication *between attorneys and their clients* and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed *by the client*. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): “The lawyer–client 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.” And in *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be “*to encourage clients* to make full disclosure to their attorneys.”

449 U.S. at 389 (emphasis added).

In determining whether mid- and lower-level employees should be considered the “client,” the factors delineated in Upjohn and referenced by this Court in Youngs seem to presuppose the existence of an employment relationship at the time when the communications with corporate counsel occur. This is consistent with the nature of the employment relationship. Employees have duties of loyalty, obedience and due care, all of which

can entail an obligation to work cooperatively in furnishing information to the employer. See Restatement (Third) of Agency § 8.11 & cmt. *d* (2006). Ordinarily, no such obligation persists after the end of the employment relationship. See id. § 8.11 cmt. *c*.⁹

A former employee should not be considered the client for purposes of the corporate attorney-client privilege. See Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303 (E.D. Mich. 2000). As explained in Infosystems:

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.

Id. at 305 (quoting Clark Equip. Co. v. Lift Parts Mfg. Co., 1985 WL 2917, at *5 (N.D.Ill. Oct.1, 1985)); accord Shaffrath v. Hamburg Twp., 2009 WL 56031, at *1 (E.D. Mich., Jan. 8, 2009) (following Infosystems).

⁹ While this Court has not previously cited § 8.11 of the Restatement (Third) of Agency, it has cited other provisions of this Restatement favorably. See e.g. Chicago Title Ins. Co. v. Washington St. Office of Ins. Comm’r, 178 Wn. 2d 120, 138, 309 P.3d 372 (2013). Section 8.11 of the third Restatement is the counterpart to Restatement (Second) of Agency § 381 (1958), which has been cited favorably by this Court in Cogan v. Kidder, Matthews & Segner, Inc., 97 Wn. 2d 658, 663, 648 P.2d 875 (1982), and Mersky v. Multiple Listing Bureau of Olympia, Inc., 73 Wn. 2d 225, 229, 437 P.2d 897 (1968). For the cited point, § 8.11 & cmt. *c* of the third Restatement are consistent with § 381 & cmt. *f* of the second Restatement. See also Cogan, 97 Wn. 2d at 662-63 (suggesting that duty to furnish information applies “only throughout the course of the transaction for which the agent was employed”; quoting Mersky).

The potential for vicarious liability of the corporation should not change the treatment of former employees for purposes of applying the privilege to communications with corporate counsel.¹⁰

Because former employees are not corporate counsel's clients, communications with such employees should not be considered confidential for purposes of the attorney-client privilege. Generally, a communication with or in the presence of a non-client is inconsistent with the requirement of confidentiality for a communication to be privileged. See Dietz, 131 Wn. 2d at 850. A former employee has no duty to keep information learned *after* the end of employment confidential. Cf. Pacific Title, Inc. v. Pioneer Nat'l Title Ins. Co., 33 Wn. App. 874, 879, 658 P.2d 684 (suggesting limitation on use of confidential information applies only

¹⁰ Infosystems seems to admit the possibility of extending the privilege to former employees "where the former employee retains a present connection or agency relationship with the client corporation, or where the present-day communication concerns a confidential matter that was uniquely within the knowledge of the former employee when he worked for the client corporation, such that counsel's communications with this former employee must be cloaked with the privilege in order for meaningful fact-gathering to occur," and places the burden of showing that corporate counsel's communications differed from communications with other third-party witnesses in one of these ways. 197 F.R.D. at 306. Applying the privilege to situations where the former employee has a present agency relationship with the corporation is consistent with the analysis set forth in this brief, assuming the corporation asserting the privilege has otherwise satisfied the requirements of Upjohn. However, privileging post-employment communications with former employees for information-gathering purposes, even for "a confidential matter ... uniquely within the knowledge of the former employee," is not warranted in light of the end of the employment relationship and the ability to discover the facts via non-privileged ex parte interviews or discovery. In any event, Highland has not attempted to show that the circumstances described in Infosystems are present here.

to such information obtained in the course of employment), *review denied*, 99 Wn. 2d 1020 (1983).

Accordingly, the Restatement (Third) of the Law Governing Lawyers § 73(2) & cmt. *e* (2000) generally limits the corporate attorney-client privilege to communications with *current* employees:

e. The temporal relationship of principal-agent. Under Subsection (2), a person making a privileged communication to a lawyer for an organization must then be acting as agent of the principal-organization. The objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer (see Comment *d* hereto). Generally, that premise implies that persons be agents of the organization at the time of communicating. The privilege may also extend, however, to communications with a person with whom the organization has terminated, for most other purposes, an agency relationship. A former agent is a privileged person under Subsection (2) if, at the time of communicating, the former agent has a continuing legal obligation to the principal-organization to furnish the information to the organization's lawyer. The scope of such a continuing obligation is determined by the law of agency and the terms of the employment contract (see Restatement Second, Agency § 275, Comment *e*, & § 381, Comment *f*)

(Ellipses added.)¹¹ Under the above-quoted language, communications with former employees are not privileged unless there is some continuing obligation to the corporation based in agency law that warrants application

¹¹ The text of Restatement (Third) of the Law Governing Lawyers § 73, including comments, but excluding reporter's notes, is reproduced in the Appendix. While this section of the Restatement has not been cited in Washington, other sections of this Restatement have been cited favorably by the Court. See e.g. *Schmidt v. Coogan*, 181 Wn. 2d 661, 673, 335 P.3d 424 (2014).

of the privilege. See id.¹² Highland's briefing does not identify any such obligation that would justify extending the corporate attorney-client privilege to post-employment communications with its former coaches, and the Restatement does not support extending the privilege merely because former employees are alleged to have committed the tortious acts or omissions giving rise to the lawsuit.¹³

Otherwise, Highland relies on a number of cases decided after Upjohn to argue the general proposition that the corporate attorney-client privilege extends to former employees. See Highland Amended Br. at 16-17; Highland Reply Br. at 16 (citing Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1493 (9th Cir. 1989); United States v. Chen, 99 F.3d

¹² Regarding the continuing obligation justification, see also Peralta v. Cendant Corp., 190 F.R.D. 38, 41 n.1 (D. Conn. 1999) (stating “[a]ccording to the Restatement (Third) of the Law Governing Lawyers, the attorney-client privilege would not normally attach to communications between former employees and counsel for the former employer” in the absence of “a continuing duty to the corporation” based on agency principles; mis-citing § 123 cmt. *e*, rather than § 73 cmt. *e*); Infosystems, 197 F.R.D. at 306 (stating “there may be situations where the former employee retains a present connection or agency relationship with the client corporation” that would justify application of the privilege).

¹³ Restatement (Third) of the Law Governing Lawyers § 73 cmt. *e* also states “[t]he privilege covers communications with a lawyer for an organization by a retired officer of the organization concerning a matter within the officer's prior responsibilities that is of legal importance to the organization.” The rationale for applying the privilege to post-employment communications under these circumstances is not explained, and may be influenced by the “control group” concept discussed in Upjohn. In any event, it does not appear from the briefing that the former coaches would be considered “retired officers” of the school district.

1495, 1502 (9th Cir. 1996); In Re Allen, 106 F.3d 582, 605-06, (4th Cir. 1997)).

As Newman points out, three of these cases are distinguishable because they involve communications that occurred while the employee was still employed by the corporation. See Newman Br. at 24; see also Coordinated Pretrial Proceedings, 658 F.2d at 1361 n. 7 (stating “the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged *after the employee leaves*”; emphasis added); Admiral Ins., 881 F.2d at 1489 (noting that communications occurred while employees were still employed); Chen, 99 F.3d at 1502-04 (indicating employee learned privileged information while employed by corporation and information remained privileged after end of employment); but see Allen, 106 F.3d at 605 (extending privilege to employee not employed by government agency at the time of communication).¹⁴

All of the cases cited by Highland offer the same rationale for extending Upjohn to former employees, i.e., that former employees may

¹⁴ With respect to communications between corporate counsel and employees occurring *during* their employment—as in Coordinated Pretrial Proceedings, Admiral Ins., and Chen—treating these communications as privileged is consistent with employees’ general duty to preserve the confidentiality of information learned during their employment, even after the end of the employment relationship. However, with respect to communications with former employees occurring *after* the employment relationship has ended—as in Allen—there should be no duty of confidentiality. Cf. Pacific Title, 33 Wn. App. at 879.

possess relevant information needed by corporate counsel to advise the corporation. See Coordinated Pretrial Proceedings, 658 F.2d at 1361 n.7; Admiral Ins., 881 F.2d at 1493 (citing Coordinated Pretrial Proceedings); Chen, 99 F.3d at 1502 (citing Coordinated Pretrial Proceedings); Allen, 106 F.3d at 605-06 (citing, *inter alia*, Coordinated Pretrial Proceedings and Admiral Ins.). It is noteworthy that these cases do not expressly rely on the corporation's potential vicarious liability for the acts of former employees as a basis for extending the privilege to communications with such employees, including the post-employment communications at issue in Allen.

The information-gathering rationale stated in all of these cases does not provide a principled basis for considering former employees as the client, nor for considering post-employment communications with such employees as confidential. Moreover, this rationale proves too much because, like former employees, unrelated third parties may also possess relevant information needed by corporate counsel to advise the corporation, and yet communications with such third parties are not privileged. There is nothing to prevent corporate counsel from communicating *ex parte* with former employees in lieu of discovery, as with any other third-party witnesses. However, counsel choosing to

engage in such communications must do so with the clear understanding that this interaction will be subject to scrutiny by others.¹⁵

Not extending the privilege to post-employment communications with former employees is in keeping with the “strictly limited” application of the attorney-client privilege endorsed by this Court. See Pappas, 114 Wn. 2d at 203-04. Such an approach should have the beneficial effect of allowing discovery regarding conduct that may have a tendency to influence or shape witness recollection and testimony, and also encourage counsel to steer clear of such conduct in the first place.

The Court should adopt a bright-line rule that the attorney-client privilege does not apply to communications between corporate counsel and former employees occurring after the end of their employment. While Upjohn eschewed the call for a bright-line test regarding the scope of the privilege *within* the corporation, see 449 U.S. at 396-97, and created what is described by this Court as a “flexible test” for applying the privilege to current employees, see Youngs at 651 n.2 & 663, Upjohn also recognizes the value of predictability in determining when the privilege applies:

¹⁵ It is unclear from the briefing how the approach of Highland’s lawyers to communications with the school district’s former coaches would differ, depending on whether the communications are privileged or not. Highland states that the difference is candor. See Highland Amended Br. at 14 (referring to “freedom to candidly communicate”); id. at 22 (referring to “candid and forthright conversations with the coaches”); Highland Reply Br. at 12 (referring again to “freedom to candidly communicate”). The standard definition of “candid” is “expressing opinions and feelings in an honest and sincere way.” *Merriam-Webster Online*, s.v. “candid” (available at www.m-w.com; viewed Sept. 27, 2015).

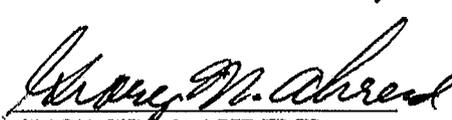
if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the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

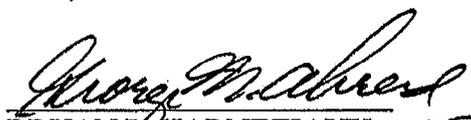
449 U.S. at 393. A bright-line rule in this particular context, involving post-employment communications with former employees, will assist lawyers in conducting discovery and avoid entangling trial courts in disputes regarding application of the privilege.

VI. CONCLUSION

The Court should resolve the issue on review in accordance with the analysis set forth in this brief.

DATED this 27th day of September, 2015.


GEORGE M. AHREND


BRYAN R. HARNETIAUX, WITH AUTHORITY

On Behalf of WSAJ Foundation

Appendix

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

MATTHEW A. NEWMAN, an
incapacitated adult, and RANDY
NEWMAN and MARLA NEWMAN,
parents and Guardians of said
incapacitated adult

Plaintiffs,

vs.

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

Defendant.

NO. 12-2-03162-1

Court's Decision on Issue of Possible
Attorney-Client Privilege with Former
Employees of Defendant, and Other
Discovery Matters

In discovery, plaintiffs sought disclosure of communications between defense counsel and former employees made after the employment ended and not during the time defense counsel claims to have represented the former employees for purposes of their depositions. The defense claims all such communications are protected by the attorney-client privilege, relying on *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486 (1989). That case is distinguishable from the present case in that the employees in *Admiral Ins.* were interviewed by counsel for the employer

Court's Decision on Issue of Possible
Attorney-Client Privilege with Former
Employees of Defendant, and Other Discovery Matters -1

1 while they were still employed. They were then terminated after the
2 interviews. In the present case, the communications at issue all occurred
3 long after the employees had left the employer.

4 There is language in *Admiral Ins.* that may make it appear as though
5 the privilege always extends to former employees. For example, the
6 *Admiral Ins.* opinion quotes as follows from *In re Coordinated Pretrial*
7 *Proceedings*, 658 F.2d 1355 (9th Cir.1981) cert. denied, 455 U.S. 990, 102
8 S.Ct. 1615, 71 L.Ed.2d 850 (1982):

9 Former employees, as well as current employees, may possess the
10 relevant information needed by corporate counsel to advise the client
11 with respect to actual or potential difficulties.

12 *Id.* at 1361 n. 7. However, the very next sentence makes it clear that the
13 *Coordinated Pretrial Proceedings* court is referring to communications that
14 occurred before the employment of the witnesses was terminated:

15 Again, the attorney-client privilege is served by the certainty that
16 conversations between the attorney and client will remain privileged
17 after the employee leaves.

18 *Id.* (Emphasis added).

19 The *Coordinated Pretrial Proceedings* opinion does not directly
20 address the issue at hand. Neither does *Admiral Ins.* Defendant also relies
21 on *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d
22 584 (1981), but that opinion is expressly limited to communications that
23 occurred while the witness was still employed. *Id.* at Fn 3. Furthermore,
24 Washington does not follow *Upjohn. Wright by Wright v. Group Health*
25 *Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984).

1 The defense has not cited any authority supporting the claim of an
2 attorney-client privilege protecting post-employment communications
3 between defense counsel and former employees of the defendant.
4 Therefore, the defendant must answer the discovery requests about those
5 communications that were made when defense counsel did not represent
6 the former employees for purposes of their depositions. Defense counsel
7 may not object to deposition questions about those communications based
8 upon a claim of attorney-client privilege. Defense counsel must also
9 disclose exactly when defense counsel represented each former employee.

10 This ruling does not change the prior ruling regarding discoverability
11 of attorney work product, such as statements taken from witnesses.

12 Apparently, at least some of the former employees will be deposed
13 again, and they will not be represented by defense counsel. If defense
14 counsel wishes to interpose any objections, other than routine objections
15 that would be waived if not made, such as form of the question, defense
16 counsel must explain the objection fully, and it must relate to the rights of
17 the school district, not the witness. Defense counsel shall not provide legal
18 advice to such witnesses, either before or during the depositions.

19
20
21 Dated this 28th day of January, 2014.

22
23
24 /s/
BLAINE G. GIBSON
Superior Court Judge
25

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Title 5. Evidence (Refs & Annos)
Chapter 5.60. Witnesses--Competency (Refs & Annos)

West's RCWA 5.60.060

5.60.060. Who is disqualified--Privileged communications

Effective: June 7, 2012

Currentness

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW; PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

(3) A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

(4) Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

(6)(a) A peer support group counselor shall not, without consent of the law enforcement officer or firefighter making the communication, be compelled to testify about any communication made to the counselor by the officer or firefighter while receiving counseling. The counselor must be designated as such by the sheriff, police chief, fire chief, or chief of the Washington state patrol, prior to the incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding officer or firefighter, a witness, or a party to the incident which prompted the delivery of peer support group counseling services to the law enforcement officer or firefighter.

(b) For purposes of this section, "peer support group counselor" means a:

(i) Law enforcement officer, firefighter, civilian employee of a law enforcement agency, or civilian employee of a fire department, who has received training to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity; or

(ii) Nonemployee counselor who has been designated by the sheriff, police chief, fire chief, or chief of the Washington state patrol to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity.

(7) A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate.

(a) For purposes of this section, "sexual assault advocate" means the employee or volunteer from a community sexual assault program or underserved populations provider, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.

(b) A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and communications under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this section, the good faith of the sexual assault advocate who disclosed the confidential communication shall be presumed.

(8) A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.

(a) For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

(b) A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW 26.44.030(1) or to disclose relevant records relating to a child as required by *RCW 26.44.030(12). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.

(9) A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:

(a) With the written authorization of that person or, in the case of death or disability, the person's personal representative;

(b) If the person waives the privilege by bringing charges against the mental health counselor licensed under chapter 18.225 RCW;

(c) In response to a subpoena from the secretary of health. The secretary may subpoena only records related to a complaint or report under RCW 18.130.050;

(d) As required under chapter 26.44 or 74.34 RCW or RCW 71.05.360 (8) and (9); or

(e) To any individual if the mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose.

Credits

[2012 c 29 § 12, eff. June 7, 2012; 2009 c 424 § 1, eff. July 26, 2009; 2008 c 6 § 402, eff. June 12, 2008; 2007 c 472 § 1, eff. July 22, 2007. Prior: 2006 c 259 § 2, eff. June 7, 2006; 2006 c 202 § 1, eff. June 7, 2006; 2006 c 30 § 1, eff. June 7, 2006; 2005 c 504 § 705, eff. July 1, 2005; 2001 c 286 § 2; 1998 c 72 § 1; 1997 c 338 § 1; 1996 c 156 § 1; 1995 c 240 § 1; 1989 c 271 § 301; prior: 1989 c 10 § 1; 1987 c 439 § 11; 1987 c 212 § 1501; 1986 c 305 § 101; 1982 c 56 § 1; 1979 ex.s. c 215

§ 2; 1965 c 13 § 7; Code 1881 § 392; 1879 p 118 § 1; 1877 p 86 § 394; 1873 p 107 § 385; 1869 p 104 § 387; 1854 p 187 § 294; RRS § 1214. Cf. 1886 p 73 § 1.]

Notes of Decisions (664)

West's RCWA 5.60.060, WA ST 5.60.060

Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

Restatement (Third) of Law Governing Law § 73 (2000)

Restatement of the Law - The Law Governing Lawyers

Database updated June 2015

Restatement (Third) of The Law Governing Lawyers

Chapter 5. Confidential Client Information

Topic 2. The Attorney-Client Privilege

Title B. The Attorney-Client Privilege for Organizational and Multiple Clients

§ 73 The Privilege for an Organizational Client

Comment:

Reporter's Note

Case Citations - by Jurisdiction

When a client is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, or other for-profit or not-for-profit organization, the attorney-client privilege extends to a communication that:

- (1) otherwise qualifies as privileged under §§ 68- 72;
- (2) is between an agent of the organization and a privileged person as defined in § 70;
- (3) concerns a legal matter of interest to the organization; and
- (4) is disclosed only to:
 - (a) privileged persons as defined in § 70; and
 - (b) other agents of the organization who reasonably need to know of the communication in order to act for the organization.

Comment:

a. Scope and cross-references. This Section states the conditions under which an organization can claim the attorney-client privilege. The requirements of §§ 68- 72 must be satisfied, except that this Section recognizes a special class of agents who communicate in behalf of the organizational client (see Comment *d*). The Section also requires that the communication relate to a matter of interest to the organization as such (see Subsection (3) & Comment *f* hereto) and that it be disclosed within the organization only to persons having a reasonable need to know of it (see Subsection (4)(b) & Comment *g* hereto).

Conflicts of interest between an organizational client and its officers and other agents are considered in § 131, Comment *e*. On the application of the privilege to governmental organizations and officers, see § 74.

b. Rationale. The attorney-client privilege encourages organizational clients to have their agents confide in lawyers in order to realize the organization's legal rights and to achieve compliance with law (Comment *d* hereto). Extending the privilege to corporations and other organizations was formerly a matter of doubt but is no longer questioned. However, two pivotal questions must be resolved.

The first is defining the group of persons who can make privileged communications on behalf of an organization. Balance is required. The privilege should cover a sufficiently broad number of organizational communications to realize the organization's policy objectives, but not insulate ordinary intraorganizational communications that may later have importance as evidence. Concern has been expressed, for example, that the privilege would afford organizations "zones of silence" that would be free of evidentiary scrutiny. A subsidiary problem is whether persons who would be nonprivileged occurrence witnesses with respect to communications to a lawyer representing a natural person can be conduits of privileged communications when the client is an organization. That problem has been addressed in terms of the "subject-matter" and "control-group" tests for the privilege (see Comment *d*).

Second is the problem of defining the types of organizations treated as clients for purposes of the privilege. It is now accepted that the privilege applies to corporations, but some decisions have questioned whether the privilege should apply to unincorporated associations, partnerships, or sole proprietorships. Neither logic nor principle supports limiting the organizational privilege to the corporate form (see Comment *c* hereto).

c. Application of the privilege to an organization. As stated in the Section, the privilege applies to all forms of organizations. A corporation with hundreds of employees could as well be a sole proprietorship if its assets were owned by a single person rather than its shares being owned by the same person. It would be anomalous to accord the privilege to a business in corporate form but not if it were organized as a sole proprietorship. In general, an organization under this Section is a group having a recognizable identity as such and some permanency. Thus, an organization under this Section ordinarily would include a law firm, however it may be structured (as a professional corporation, a partnership, a sole proprietorship, or otherwise). The organization need not necessarily be treated as a legal entity for any other legal purpose. The privilege extends as well to charitable, social, fraternal, and other nonprofit organizations such as labor unions and chambers of commerce.

d. An agent of an organizational client. As stated in Subsection (2), the communication must involve an agent of the organization, on one hand, and, on the other, a privileged person within the meaning of § 70, such as the lawyer for the organization. Persons described in Subsection (4)(b) may disclose the communication under a need-to-know limitation (see Comment *g* hereto). The existence of a relationship of principal and agent between the organizational client and the privileged agent is determined according to agency law (see generally Restatement Second, Agency §§ 1-139).

Some decisions apply a "control group" test for determining the scope of the privilege for an organization. That test limits the privilege to communications from persons in the organization who have authority to mold organizational policy or to take action in accordance with the lawyer's advice. The control-group circle excludes many persons within an organization who normally would cooperate with an organization's lawyer. Such a limitation overlooks that the division of functions within an organization often separates decisionmakers from those knowing relevant facts. Such a limitation is unnecessary to prevent abuse of the privilege (see Comment *g*) and significantly frustrates its purpose.

Other decisions apply a "subject matter" test. That test extends the privilege to communications with any lower-echelon employee or agent so long as the communication relates to the subject matter of the representation. In substance, those decisions comport with the need-to-know formulation in this Section (see Comment *g*).

It is not necessary that the agent receive specific direction from the organization to make or receive the communication (see Comment *h*).

Agents of the organization who may make privileged communications under this Section include the organization's officers and employees. For example, a communication by any employee of a corporation to the corporation's lawyer concerning the matter as to which the lawyer was retained to represent the corporation would be privileged, if other conditions of the privilege are satisfied. The concept of agent also includes independent contractors with whom the corporation has a principal-agent relationship and extends to agents of such persons when acting as subagents of the organizational client. For example, a foreign-

based corporation may retain a general agency (perhaps a separate corporation) in an American city for the purpose of retaining counsel to represent the interests of the foreign-based corporation. Communications by the general agency would be by an agent for the purpose of this Section.

For purpose of the privilege, when a parent corporation owns controlling interest in a corporate subsidiary, the parent corporation's agents who are responsible for legal matters of the subsidiary are considered agents of the subsidiary. The subsidiary corporation's agents who are responsible for affairs of the parent are also considered agents of the parent for the purpose of the privilege. Directors of a corporation are not its agents for many legal purposes, because they are not subject to the control of the corporation (see Restatement Second, Agency § 14C). However, in communications with the organization's counsel, a director who communicates in the interests and for the benefit of the corporation is its agent for the purposes of this Section. Depending on the circumstances, a director acts in that capacity both when participating in a meeting of directors and when communicating individually with a lawyer for the corporation about the corporation's affairs. Communications to and from nonagent constituents of a corporation, such as shareholders and creditors, are not privileged.

In the case of a partnership, general partners and employees and other agents and subagents of the partnership may serve as agents of the organization for the purpose of making privileged communications (see generally Restatement Second, Agency § 14A). Limited partners who have no other relationship (such as employee) with the limited partnership are analogous to shareholders of a corporation and are not such agents.

In the case of an unincorporated association, agents whose communications may be privileged under this Section include officers and employees and other contractual agents and subagents. Members of an unincorporated association, for example members of a labor union, are not, solely by reason of their status as members, agents of the association for the purposes of this Section. In some situations, for example, involving a small unincorporated association with very active members, the members might be considered agents for the purpose of this Section on the ground that the association functionally is a partnership whose members are like partners.

In the case of an enterprise operated as a sole proprietorship, agents who may make communications privileged under this Section with respect to the proprietorship include employees or contractual agents and subagents of the proprietor.

Communications of a nonagent constituent of the organization may be independently privileged under § 75 where the person is a co-client along with the organization. If the agent of the organization has a conflict of interest with the organization, the lawyer for the organization must not purport to represent both the organization and the agent without consent (see § 131, Comment c). The lawyer may not mislead the agent about the nature of the lawyer's loyalty to the organization (see § 103). If a lawyer fails to clarify the lawyer's role as representative solely of the organization and the organization's agent reasonably believes that the lawyer represents the agent, the agent may assert the privilege personally with respect to the agent's own communications (compare § 72(2), Comment f; see also § 131, Comment e).

The lawyer must also observe limitations on the extent to which a lawyer may communicate with a person of conflicting interests who is not represented by counsel (see § 103) and limitations on communications with persons who are so represented (see § 99 and following).

e. The temporal relationship of principal-agent. Under Subsection (2), a person making a privileged communication to a lawyer for an organization must then be acting as agent of the principal-organization. The objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer (see Comment d hereto). Generally, that premise implies that persons be agents of the organization at the time of communicating. The privilege may also extend, however, to communications with a person with whom the organization has terminated, for most other purposes, an agency relationship. A former agent is a privileged person under Subsection (2) if, at the time of communicating, the former agent has a continuing legal obligation to the principal-organization to furnish the information to the organization's lawyer. The scope of such a continuing obligation is determined by the law of agency and the terms of the employment contract (see Restatement Second, Agency § 275,

Comment *e*, & § 381, Comment *f*). The privilege covers communications with a lawyer for an organization by a retired officer of the organization concerning a matter within the officer's prior responsibilities that is of legal importance to the organization.

Subsection (2) does not include a person with whom the organization established a principal-agent relationship predominantly for the purpose of providing the protection of the privilege to the person's communications, if the person was not an agent at the time of learning the information. For example, communications between the lawyer for an organization and an eyewitness to an event whose communications would not otherwise be privileged cannot be made privileged simply through the organization hiring the person to consult with the organization's lawyer. (As to experts and similar persons employed by a lawyer, see § 70, Comment *g*).

Ordinarily, an agent communicating with an organization's lawyer within this Section will have acquired the information in the course of the agent's work for the organization. However, it is not necessary that the communicated information be so acquired. Thus, a person may communicate under this Section with respect to information learned prior to the relationship or learned outside the person's functions as an agent, so long as the person bears an agency relationship to the principal-organization at the time of the communication and the communication concerns a matter of interest to the organization (see Comment *f*). For example, a chemist for an organization who communicates to the organization's lawyer information about a process that the chemist learned prior to being employed by the organization makes a privileged communication if the other conditions of this Section are satisfied.

f. Limitation to communications relating to the interests of the organization. Subsection (3) requires that the communication relate to a legal matter of interest to the organization. The lawyer must be representing the organization as opposed to the agent who communicates with the lawyer, such as its individual officer or employee. A lawyer representing such an officer or employee, of course, can have privileged communications with that client. But the privilege will not be that of the organization. When a lawyer represents as co-clients both the organization and one of its officers or employees, the privileged nature of communications is determined under § 75. On the conflicts of interest involved in such representations, see § 131, Comment *e*.

g. The need-to-know limitation on disclosing privileged communications. Communications are privileged only if made for the purpose of obtaining legal services (see § 72), and they remain privileged only if neither the client nor an agent of the client subsequently discloses the communication to a nonprivileged person (see § 79; see also § 71, Comment *d*). Those limitations apply to organizational clients as provided in Subsection (4). Communications become, and remain, so protected by the privilege only if the organization does not permit their dissemination to persons other than to privileged persons. Agents of a client to whom confidential communications may be disclosed are generally defined in § 70, Comment *f*, and agents of a lawyer are defined in § 70, Comment *g*. Included among an organizational client's agents for communication are, for example, a secretary who prepares a letter to the organization's lawyer on behalf of a communicating employee.

The need-to-know limitation of Subsection (4)(b) permits disclosing privileged communications to other agents of the organization who reasonably need to know of the privileged communication in order to act for the organization in the matter. Those agents include persons who are responsible for accepting or rejecting a lawyer's advice on behalf of the organization or for acting on legal assistance, such as general legal advice, provided by the lawyer. Access of such persons to privileged communications is not limited to direct exchange with the lawyer. A lawyer may be required to take steps assuring that attorney-client communications will be disseminated only among privileged persons who have a need to know. Persons defined in Subsection (4)(b) may be apprised of privileged communications after they have been made, as by examining records of privileged communications previously made, in order to conduct the affairs of the organization in light of the legal services provided.

Illustration:

Illustration:

1. Lawyer for Organization makes a confidential report to President of Organization, describing Organization's contractual relationship with Supplier, and advising that Organization's contract with Supplier could be terminated without liability. President sends a confidential memorandum to Manager, Organization's purchasing manager, asking whether termination of the contract would nonetheless be inappropriate for business reasons. Because Manager's response would reasonably depend on several aspects of Lawyer's advice, Manager would have need to know the justifying reason for Lawyer's advice that the contract could be terminated. Lawyer's report to President remains privileged notwithstanding that President shared it with Manager.

The need-to-know concept properly extends to all agents of the organization who would be personally held financially or criminally liable for conduct in the matter in question or who would personally benefit from it, such as general partners of a partnership with respect to a claim for or against the partnership. It extends to persons, such as members of a board of directors and senior officers of an organization, whose general management and supervisory responsibilities include wide areas of organizational activities and to lower-echelon agents of the organization whose area of activity is relevant to the legal advice or service rendered.

Dissemination of a communication to persons outside those described in Subsection (4)(b) implies that the protection of confidentiality was not significant (see § 71, Comment *b*). An organization may not immunize documents and other communications generated or circulated for a business or other nonlegal purpose (see § 72).

h. Directed and volunteered agent communications. It is not necessary that a superior organizational authority specifically direct an agent to communicate with the organization's lawyer. Unless instructed to the contrary, an agent has authority to volunteer information to a lawyer when reasonably related to the interests of the organization. An agent has similar authority to respond to a request for information from a lawyer for the organization. And the lawyer for the organization ordinarily may seek relevant information directly from employees and other agents without prior direction from superior authorities in the organization.

i. Inside legal counsel and outside legal counsel. The privilege under this Section applies without distinction to lawyers who are inside legal counsel or outside legal counsel for an organization (see § 72, Comment *c*). Communications predominantly for a purpose other than obtaining or providing legal services for the organization are not within the privilege (see § 72, Comment *c*). On the credentials of a lawyer for the purposes of the privilege, see § 72(1), Comment *e*.

j. Invoking and waiving the privilege of an organizational client. The privilege for organizational clients can be asserted and waived only by a responsible person acting for the organization for this purpose. On waiver, see §§ 78- 80. Communications involving an organization's director, officer, or employee may qualify as privileged, but it is a separate question whether such a person has authority to invoke or waive the privilege on behalf of the organization. If the lawyer was representing both the organization and the individual as co-clients, the question of invoking and waiving the privilege is determined under the rule for co-clients (see § 75, Comment *e*). Whether a lawyer has formed a client-lawyer relationship with a person affiliated with the organization, as well as with the organization, is determined under § 14. Communications of such a person who approaches a lawyer for the organization as a prospective client are privileged as provided in § 72. Unless the person's contrary intent is reasonably manifest to a lawyer for the organization, the lawyer acts properly in assuming that a communication from any such person is on behalf and in the interest of the organization and, as such, is privileged in the interest of the organization and not of the individual making the communication. When the person manifests an intention to make a communication privileged against the organization, the lawyer must resist entering into such a client-lawyer relationship and receiving such a communication if doing so would constitute an impermissible conflict of interest (see § 131, Comment *e*).

An agent or former agent may have need for a communication as to which the organization has authority to waive the privilege, for example, when the agent is sued personally. A tribunal may exercise discretion to order production of such a communication for benefit of the agent if the agent establishes three conditions. First, the agent must show that the agent properly came to know the contents of the communication. Second, the agent must show substantial need of the communication. Third, the agent must show that production would create no material risk of prejudice or embarrassment to the organization beyond such

evidentiary use as the agent may make of the communication. Such a risk may be controlled by protective orders, redaction, or other measures.

Illustration:

Illustration:

2. Lawyer, representing only Corporation, interviews Employee by electronic mail in connection with reported unlawful activities in Corporation's purchasing department in circumstances providing Corporation with a privilege with respect to their communications. Corporation later dismisses Employee, who sues Corporation, alleging wrongful discharge. Employee files a discovery request seeking all copies of communications between Employee and Lawyer. The tribunal has discretion to order discovery under the conditions stated in the preceding paragraph. In view of the apparent relationship of Employee's statements to possible illegal activities, it is doubtful that Employee could persuade the tribunal that access by Employee would create no material risk that third persons, such as a government agency, would thereby learn of the communication and thus gain a litigation or other advantage with respect to Corporation.

k. Succession in legal control of an organization. When ownership of a corporation or other organization as an entity passes to successors, the transaction carries with it authority concerning asserting or waiving the privilege. After legal control passes in such a transaction, communications from directors, officers, or employees of the acquired organization to lawyers who represent only the predecessor organization, if it maintains a separate existence from the acquiring organization, may no longer be covered by the privilege. When a corporation or other organization has ceased to have a legal existence such that no person can act in its behalf, ordinarily the attorney-client privilege terminates (see generally § 77, Comment c).

Illustration:

Illustration:

3. X, an officer of Ajax Corporation, communicates in confidence with Lawyer, who represents Ajax, concerning dealings between Ajax and one of its creditors, Vendor Corporation. Ajax later is declared bankrupt and a bankruptcy court appoints Trustee as the trustee in bankruptcy for Ajax. Thereafter, Lawyer is called to the witness stand in litigation between Vendor Corporation and Trustee. Trustee has authority to determine whether the attorney-client privilege should be asserted or waived on behalf of the bankrupt Ajax Corporation with respect to testimony by Lawyer about statements by X. X cannot assert a privilege because X was not a client of Lawyer in the representation. Former officers and directors of Ajax cannot assert the privilege because control of the corporation has passed to Trustee.

A lawyer for an organization is ordinarily authorized to waive the privilege in advancing the interests of the client (see § 61 & § 79, Comment c). Otherwise, when called to testify, a lawyer is required to invoke the privilege on behalf of the client (see § 86(1)(b)). On waiver, see §§ 78- 80.

Reporter's Note

Comment b. Rationale. See generally J. Gergacz, *Attorney-Corporate Client Privilege* (1987); M. Graham, *Federal Evidence* § 503.3 (2d ed.1986); 1 C. McCormick, *Evidence* § 87.1 (J. Strong 4th ed.1992); C. Mueller & L. Kirkpatrick, *Modern Evidence* § 5.16 (1995); P. Rice, *Attorney-Client Privilege in the United States* § 4.9 et seq. (1993); 2 J. Weinstein & M. Berger, *Evidence* § 503(b)[04] (1986); C. Wolfram, *Modern Legal Ethics* § 6.5 (1986); 24 C. Wright & K. Graham, *Federal Practice & Procedure* § 5476 (1986); *id.* at 135 ("one of the most perplexing issues in the law of privilege").

OFFICE RECEPTIONIST, CLERK

To: Shari Canet
Cc: "Mark Northcraft"; "Andrew Biggs"; "Richard Adler"; "Arthur Leritz"; "Melissa Carter"; "Fred Langer"; "Michael Nelson"; "Howard Goodfriend"; "Stewart Estes"; "Bryan Harnetiaux"; "George Ahrend"
Subject: RE: Newman v. Highland School Dist., No. 203 (S.C. #90194-5)

Received on 09-28-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Shari Canet [mailto:scanet@ahrendlaw.com]
Sent: Sunday, September 27, 2015 4:46 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: "Mark Northcraft" <mark_northcraft@northcraft.com>; "Andrew Biggs" <andrew_biggs@northcraft.com>; "Richard Adler" <radler@adlergiersch.com>; "Arthur Leritz" <aleritz@adlergiersch.com>; "Melissa Carter" <mdcarter@adlergiersch.com>; "Fred Langer" <fredl@nblelaw.com>; "Michael Nelson" <miken@nblelaw.com>; "Howard Goodfriend" <howard@washingtonappeals.com>; "Stewart Estes" <sestes@kbmlawyers.com>; "Bryan Harnetiaux" <amicuswsajf@wsajf.org>; "George Ahrend" <gahrend@ahrendlaw.com>
Subject: Newman v. Highland School Dist., No. 203 (S.C. #90194-5)

Dear Mr. Carpenter:

On behalf of the WSAJ Foundation, a letter request to file an Amicus Curiae Brief and an accompanying Amicus Curiae Brief are attached to this email for filing with the Court. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--

Shari M. Canet, Paralegal
Ahrend Law Firm PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000 ext. 810
Fax (509) 464-6290

The information contained in this email transmission and any attachments is
CONFIDENTIAL. Anyone other than the intended recipient is prohibited from reading,

copying, or distributing this transmission and any attachments. If you are not the intended recipient, please notify the sender immediately by calling (509) 764-9000.