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COZEN O'CONNOR

Washington Supreme Court: Corporate Attorney's Communications with Former Employees Not Privileged

The Supreme Court of Washington recently held that the attorney-client privilege does not protect a corporation's attorney's communications with former employees of the corporation, even if the communications concern events that occurred during employment and within the scope of employment. *Newman, et al. v. Highland School District No. 203*, No. 90194-5 (Wash. Oct. 20, 2016). As a result, insurers should be cautious in interviewing and communicating with former employees in connection with coverage and bad-faith litigation, where the insured or the former employees are located in Washington state.

In *Newman*, the plaintiff suffered a permanent brain injury during a football game in 2009 and sued the school district for negligence. The school district's attorneys interviewed coaches who were no longer employed by the district and then represented those coaches at their depositions. While the Supreme Court's opinion does not provide a precise timeline, it appears that at least some of the pre-deposition interviews occurred before the former coaches retained the attorneys to represent them personally.

The plaintiff then sought discovery of communications between defense counsel and the former coaches. The trial court ruled that communications that occurred before the former coaches personally retained defense counsel were not privileged.

The Washington Supreme Court narrowly affirmed, in a 5-4 decision. It noted (contrary to the trial court) that Washington state **had** adopted the U.S. Supreme Court's holding of *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *Upjohn* rejected the "control group test" that held only upper management could qualify as a "client" for the purposes of determining whether an "attorney-client" privilege applied. *Upjohn* observed that the control group test "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). Instead, SCOTUS adopted a flexible test to determine whether communications with non-managerial employees were privileged. It examined several factors, including whether the communications at issue: (1) were made at the direction of corporate superiors; (2) were made by corporate employees; (3) were made to corporate counsel acting as such; (4) concerned matters within the scope of the employee's duties; (5) revealed factual information "not available from upper-echelon management;" (6) revealed factual information necessary "to supply a basis for legal advice;" and whether the communicating employee was sufficiently aware that (7) he was being interviewed for legal purposes; and (8) the information would be kept confidential. *See Newman*, slip opinion, p. 7.

While *Upjohn* did not control the scope of the attorney-client privilege in state court (or in federal court with respect to state-law claims), the decision has been enormously influential on state law, as well. Since *Upjohn*, corporate counsel typically provide "*Upjohn* warnings" to employees they interview in the course of an internal investigation, particularly to ensure awareness of factors (7) and (8), above. *Upjohn* declined to decide whether its "flexible test" extended to communications with **former** employees about events within the scope of employment — although Justice Burger's concurrence stated that it did. Most courts following *Upjohn* have followed Justice Burger's concurrence and applied its test to former employees. *See*, e.g., *In re Allen*, 106 F.3d 582, 605 (4th Cir. 1997) (collecting cases).

But the Washington Supreme Court declined to do so in *Newman*. It held that individuals no longer employed by the corporate client cannot themselves qualify as "clients" unless they personally retain corporate counsel to represent them. The court noted that *Upjohn* was based on the corporation's ability to require its employees to disclose facts material to their duties, as well as

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the employee's status as an agent of the corporation. These factors, said the court, are absent with respect to **former** employees. The court reasoned that although they may exclusively possess facts crucial to the corporation's defense, the former employees are no different than any other third-party witness in that respect.

The vigorous, 18-page dissent in *Newman* argued that the majority's bright-line temporal limitation ignored the fundamental purpose behind the *Upjohn* test, which was "facilitating the flow of relevant and necessary information from lower-level employees to counsel." As *Upjohn* noted, a corporation is an inanimate entity that can only act through its employees and agents. If all employees familiar with the events in question leave the company, the corporate attorneys will be unable to obtain their own client's information regarding those events in confidence and formulate advice based on that information. The dissent pointed out that former employees are in a different position from other third-party witnesses insofar as they were knowledgeable agents of the corporation with respect to the time period and subjects at issue in the litigation.

The *Newman* decision is significant for insurers, as formerly employed claims-handlers often become witnesses in coverage or bad-faith litigation. Where Washington law applies, insurers are well-advised to consider whether former claims-handlers retain corporate counsel to represent them individually. This course of action may not be feasible where a conflict of interest exists, particularly where the former employee has personal exposure or where the corporation is likely to pin the blame on the employee individually. However, that situation is rare in the insurance coverage and bad faith context. In the typical insurance litigation, a former employee should be permitted to retain corporate counsel to represent him individually.

This raises the question: **when** do insurers need to take steps to mitigate the effects of *Newman*? In other words, when does Washington law apply? Choice of law questions are notoriously thorny and difficult to predict, and no Washington case has applied choice of law rules to questions regarding the attorney-client privilege. Another state's law might apply to communications with employees in that state, even if the insured and/or the coverage litigation is located in Washington. *See*, e.g., *Equity Residential v. Kendall Risk Mgmt.*, Inc., 246 F.R.D. 557, 565 (N.D. Ill. 2007) (holding that Connecticut law applied to protect communications with Connecticut insurer's employees, even though insured and coverage litigation were located in Illinois). Conversely, Washington law might apply in coverage litigation against a Washington insured venued in Washington, even if the insurer is located in another state and the communications occurred in that state. *See*, e.g., *Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1042, 1060 (Ill. App. Ct. 2007). Thus, the safest course is to take the necessary precautions where either the former employee **or** the insured is located in Washington, and certainly when coverage litigation is already pending in Washington.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact William F. Knowles at wknowles@cozen.com or (206) 224-1289 or Jonathan Toren at jtoren@cozen.com or (206) 224-1260.