

# WASHINGTON CASE UPDATE

## Attorney-Client Privilege Does not Include Post-Employment Communications

**From the Desk of Kyle D. Riley:** Generally, corporate attorney-client privilege encompasses certain communications with lower level employees. In this case, the Washington Supreme Court was tasked with analyzing whether the corporate privilege encompasses postemployment communications between corporate counsel and former employees.

**Claims Pointer:** In this case of first impression arising out of a high school student's permanent brain injury, the Washington Supreme Court held that corporate attorney-client privilege does not encompass postemployment communications with former employees. The case serves as a warning to attorneys and corporations that sensitive discussions with former employees will likely be discoverable.

Newman v. Highland School District No. 203, No. 90194-5, Washington Supreme Court (October 20, 2016)

Matthew Newman ("Newman") was a high school quarterback at Highland High School. During a September 2009 football game, he sustained a permanent brain injury. Newman and his parents sued Highland School District No. 203 ("Highland"), alleging that Newman sustained a head injury during practice the day before the game, and the coaches permitted him to play in the game even though he exhibited symptoms of a concussion.

Newman's attorney deposed the entire football coaching staff employed at the time of Newman's injury, including coaches who were no longer employed by Highland. At the deposition, Highland's attorney indicated he interviewed the former coaches before their depositions and was appearing on their behalf for the depositions. Newman moved to disqualify Highland's attorney from representing the former coaches on the grounds that there was a conflict of interest. The trial court denied the motion but ruled that Highland's attorney could not represent non-employee witnesses going forward.

Newman then sought discovery concerning communications between Highland's attorney and its former coaches. Highland moved for a protective order to shield those

communications, asserting attorney-client privilege. The trial court denied the protective order and directed Highland to respond to Newman's discovery requests and also to disclose when its attorney represented each former employee. Moreover, the court barred Highland's attorney from asserting the attorney-client privilege with respect to communications outside the deposition representation. Highland sought discretionary review of the superior court's discovery order, which the Washington Court of Appeals denied. The Washington Supreme Court subsequently granted discretionary review and entered a temporary stay of discovery.

Whether the attorney-client privilege extends to postemployment communications between corporate counsel and former employees is an issue of first impression in Washington. Generally, parties may obtain discovery regarding any unprivileged and relevant matter. Washington's attorney-client privilege protects communications made in confidence and in the context of an attorney-client relationship. In the corporate context, the privilege includes corporate clients and may encompass some communications with lower level employees.

Generally, the test for determining the scope of the corporate attorney-client privilege is flexible, and depends on a number of factors, including whether the communications at issue (1) were made at the direction of corporate

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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 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.

In analyzing whether post-employment communications with former employees should be privileged, the Washington Supreme Court explained that such a flexible approach presupposes that the attorney-client communications took place within a corporate employment relationship. According to the Court, when the employer-employee relationship terminates, "everything changes." Notably, the former employee is generally no longer an agent and cannot bind the corporation, nor does the employee owe duties of loyalty, obedience, and confidentiality to the corporation. As the Court explained, without the employment relationship, a former employee is no different from any other third-party fact witness to a lawsuit whom either party may interview.

Highland argued that the attorney-client privilege should be extended to include its communications with the former coaches because they might possess vital information about the case, and their conduct while employed could potentially expose Highland to vicarious liability. The Court acknowledged that such considerations were important, but it found that they did not justify expanding the attorney-client privilege. According to the Court, once the employment relationship ended, the interests of the employer and former employee might diverge. Since the attorney-client privilege belongs solely to the corporation, the corporation alone can assert or waive the privilege, even if the employee's

interests will be harmed.

The Court held that the purpose of the corporate attorney-client privilege—to foster honest communications between the counsel and the corporate client—was preserved by limiting the scope of the privilege to the duration of the employment relationship. The interests served by the privilege were sufficiently protected by recognizing that communications between corporate counsel and employees during the period of employment continued to be privileged after the agency relationship ended. The trial court's denial of Highland's motion for a protective order was therefore affirmed.

View full opinion at: <https://www.courts.wa.gov/opinions/pdf/901945.pdf>

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