



Case Law Update

Washington Supreme Court Announces New Rule on Attorney-Client Privilege: Post-Employment Communications Between Corporate Counsel and Former Employees Are Discoverable

10/21/2016

In a 5-4 decision, the Washington State Supreme Court ruled that the attorney-client privilege does not shield post-employment communications between corporate counsel and the corporation's former employees. In *Newman v. Highland School District No. 203*, --- Wn.2d ---, Cause No. 90194-5 (Oct. 20), the majority concluded that because the former employee no longer has an ongoing principal-agent relationship with the corporation, communications between former employees and corporate counsel are freely discoverable and not shielded by privilege.

The case arises out of a head injury sustained by Matthew Newman in 2009 when he was a student at Highland High School. Newman (and his parents) sued the district for negligence because the coaches employed by Highland permitted Newman to play in a game after he exhibited symptoms of a concussion, in violation of the Lystedt law, RCW 28A.600.190. Before trial, Highland's counsel represented former employee coaches at depositions. Newman then sought discovery concerning communications between Highland's counsel and former employee coaches.

The court acknowledged that it had previously adopted the flexible test for determining the scope of the attorney-client privilege recognized by the leading U.S. Supreme Court case, *Upjohn Co. v. United States*. However, *Upjohn* did not expressly answer the question of communications with former employees. This presented a question of first impression in Washington.

The court's majority decision emphasized the principal-agent relationship between employers and employees. When the employer-employee relationship ends, this generally terminates the agency relationship as well. As a result, the former employee "can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation." According to the majority, without an ongoing obligation between the

former employee and employer giving rise to this principal-agent relationship, “a former employee is no different from other third-party fact witnesses to a lawsuit who may be freely interviewed by either party.”

To expand the privilege to former employees would be unjustified, according to the court. The purpose of the attorney-client privilege is to foster full and frank communications between counsel and client, and this purpose is preserved by limiting the scope of the privilege to the duration of the employer-employee relationship. This limitation also preserves the predictability of the privilege in that the attorney and client will be able to predict with some degree of certainty whether particular discussions will be protected. The court, however, also reiterated that any privileged communication between counsel and the former employee before employment ended remains privileged.

The case also addressed the fact that Highland’s counsel appeared for and represented former employee coaches at their depositions in the case. The court upheld a lower court order allowing such representation. However, the court pointed out the potential conflicts of interest in such joint representation. In such cases, corporate counsel may represent former employees — whether named as defendants or not — for the purposes of a particular case. Prudent practices suggest that counsel should send the former employees a clear engagement letter acknowledging the limited nature of the representation as well as the existence of a potential conflict of interest. The letter should reflect that there is a possibility of a conflict of interest and that the parties do not believe such a conflict exists at this time because the interests of the parties appear to be aligned.

Corporate counsel should be aware of the privilege issue highlighted in this case. If faced with a situation where the corporation might want to maintain an ongoing attorney-privilege with a former employee, counsel will need to consider how to reestablish a relationship that will support the privilege.

For more information, please contact: lanepowellpc@lanepowell.com

1.800.426.5801

lanepowell.com

This is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2016 Lane Powell PC

Seattle | Portland | Anchorage