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Supreme Court Holds No Privilege For Communications with Former Employees

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In a case of first impression in Washington, the Supreme Court held recently that communications between corporate or governmental counsel and former employees do not fall within the attorney-client privilege even if the communications concern matters that occurred during a former employee's work for the corporation or government agency involved. The Supreme Court's 5-4 decision in *Newman v. Highland School District No. 203*, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 6126472 (Oct. 20, 2016), was on discretionary review.

Plaintiffs were a former high school football player and his parents who had sued the player's school district for a permanent brain injury the player had sustained during a game. They asserted that the player's coaches—who, at the time of the injury, were employees of the school district—had negligently permitted him to play in a game after showing signs of a concussion from a head injury during practice the day before.

Plaintiffs' counsel deposed all of the coaches—including some who were no longer employed by the school district. The school district's defense counsel represented all of the coaches at the depositions but did not continue the representation of the former coaches afterward. Plaintiffs' counsel sought communications between defense counsel and the former coaches for the

periods in which they were unrepresented (before and after the depositions). The school district filed a motion for a protective order, arguing that these communications were also covered by the attorney-client privilege. The trial court denied the motion and the school district sought discretionary review. The Court of Appeals declined review. The Supreme Court, in turn, granted review but affirmed the trial court's order on a 5-4 vote.

The majority in an opinion by Justice Stephens began by noting that, in the entity setting, the entity's privilege generally extends to communications between entity counsel and non-management employees made on behalf of the entity concerning the employee's duties for the entity. But, as the majority put it: "[E]verything changes when employment ends." 2016 WL 6126472 at *4. The majority found that privileged communications occurring *during* employment continued to be privileged after the employee left the entity. However, the majority held that there was no privilege over communications between entity counsel and a former employee occurring *after* the employee had left the entity. The majority reasoned: "Without an ongoing obligation between the former employee and employer that gives rise to a 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." *Id.* The majority, therefore, concluded

that the trial court was correct in denying the school district's motion for a protective order.

The dissent argued that the privilege should still attach to communications occurring after an employee had left when (as was the case here) the communications concerned the former employee's work for the entity. As Justice Wiggins noted in his opinion for the dissenters: "I am persuaded that the appropriate line is expressed in this simple test: Did the communications with the former employee, whenever they occurred, 'relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment?'" *Id.* at *9 (citation omitted). In taking this position, the dissent relied primarily on federal authority—including the Ninth Circuit.

In the wake of *Newman*, two caveats warrant comment. First, the *Newman* rule does not preclude privilege from attaching when either entity counsel separately represents former employees (in addition to the entity and subject to conflict limitations) or when a former employee is brought back to the entity as, for example, a consultant in connection with the litigation. Second, *Newman* discusses privileged communications only and does not address work product protection applicable to, for example, attorney notes from interviews with former employees.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.