No. 90194-5

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,

Respondents,

v.

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

Petitioner.

REVIEW FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY
THE HONORABLE BLAINE G. GIBSON

BRIEF OF *AMICUS CURIAE* WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

STATE CASES

FEDERAL CASES

STATE RULES

FEDERAL RULES

OTHER AUTHORITIES

I. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association ("WELA") appear as amicus curiae supporting the position of Plaintiffs-Respondents Matthew A. Newman and his parents. WELA has approximately 150 members and is a chapter of the National Employment Lawyers Association, a non-profit organization. WELA's members are Washington attorneys who primarily represent employees in employment law matters, including cases brought under state and federal anti-discrimination and wage statutes. WELA's principal goals are to advocate in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life.

WELA is an association of lawyers and, like all lawyers, WELA members appreciate the beneficial purposes served by appropriate application of the attorney-client privilege. WELA members also see in their practice, however, the extent to which the privilege can be misused and abused by powerful corporate employers. WELA members have a strong interest in this Court clarifying the scope of the corporate attorney-client privilege in a way that preserves employees' and former employees' ability to develop evidence of alleged wrongdoing by their employers.

WELA members also understand the importance to all members of the bar of being able to predict and advise clients on when the privilege attaches and when it does not. *See Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981) (explaining that the purposes of privilege are not served unless the attorney and client can "predict with some degree of certainty whether particular discussions will be protected"). Accordingly, WELA urges the Court to adopt a clear rule that limits the scope of the corporate attorney-client privilege to communications that take place while a person is employed by the corporation.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The record in this case presents the Court with two closely related questions. The first is about the scope of the corporate attorney-client privilege. The second is about the propriety of corporate counsel representing former employees of its corporate client. The Court should clarify that the corporate privilege does not extend to former employees, and protect that rule from subversion by corporate counsel asserting a limited attorney-client relationship with former employee for purposes of deposition.

The Newman family and their counsel faced a situation all too familiar to attorneys who represent employees in employment disputes. After noting a deposition of a former corporate employee—and sometimes after securing that witness's attendance through the subpoena power under Civil Rule 45—an attorney will often learn early in the deposition that opposing counsel is representing the third-party witness for the purpose of the deposition. In some cases, the corporation's lawyer claims to have a separate attorney-client relationship with the corporation's former employee. In others, the corporation's lawyer argues that the corporation's attorney-client privilege extends to counsel's communications with the former employee even after employment has ended.

In the former case, corporate counsel may object to questions to the former-employee witness about the scope of corporate counsel's representation. When the witness is permitted to answer, the former-employee witness will often testify that the attorney-client relationship was formed on the day of the witness's deposition preparation, that no attorney fees have been paid by the witness and none are contemplated, and that no written attorney-client agreement exists. Corporate counsel

relies upon this conveniently created attorney-client relationship to assert privilege over all communications between the corporate attorney and the witness.

This practice is particularly troubling because the former-employee witness may feel obligated to accept "representation" from corporate counsel. It is then the corporate attorney, not the former-employee witness, who enforces the privilege. It is the interests of the corporate employer which are served, not the interests of the witness, and certainly not the public interest.

The thinly disguised purpose of corporate counsel's assertion of either the corporation's privilege over communications with a former employee or limited representation of a former-employee witness is to obstruct the discovery of relevant facts. Neither approach serves the privilege's important goal of encouraging the corporate client to be candid with its lawyer. As one commentator explained, corporate counsel's representation of former-employee witnesses for purposes of a deposition "opens the door for intentional or insidious coaching of the former employees" and at the same time thwarts the opposing attorney's ability to "explore the extent of his adversary's coaching." Susan J. Becker,

Discovery of Info. and Documents from a Litigant's Former Emps.: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles, 81 Neb. L. Rev. 868, 906 (2003).

The judicial system has concluded that a litigant's interest in obtaining some types of information is outweighed by the need to encourage the *client*'s full and frank disclosure to his or her attorney. But a former employee of a corporate client—who cannot speak for or act on behalf of the corporate client—simply is not the client.[1] Undoubtedly all lawyers would like to be able to interview and prepare key third-party witnesses for deposition and then cloak all of those communications in privilege. Washington law simply does not allow them to do so, nor should it. Similarly, Washington law should not tolerate the subterfuge of a last minute attorney-client relationship created to serve the interests of a corporation rather than its former employees.

Accordingly, WELA respectfully asks this Court to clarify that communications with former employees, who are no longer agents of the corporation, are no different than communications with other third-party

[1] In cases where a corporate litigant designates a former employee as its Rule 30(b)(6) representative, thereby making the former employee a speaking agent of the corporation with the power to bind it, the attorney-client privilege would shield communications with the former employee.

witnesses and are not privileged. WELA also urges the Court address the ethically troublesome practice of corporate counsel representing former employees of their corporate clients for the "limited purpose" of a deposition when fees incurred will be paid by the corporate client.

III. AUTHORITY AND ARGUMENT

A. The Scope of the Corporate Attorney-Client Privilege Is a Question of State Law.

The Court is asked to determine the breadth of the corporate attorney-client privilege under Washington law. The School District argues that this Court should avoid a rule that would lead to the application of "differing standards" in the rare case that is filed in state court, removed to federal court, litigated there, and later remanded to state court. Petitioner's Reply at 10. This argument is a non starter. A federal court sitting in diversity will apply state, not federal, law governing privilege. *See* Fed. R. Evid. 501. As federal courts apply Washington privilege rules when adjudicating substantive claims under Washington law, there is little or no chance that "differing standards" would apply in the same case.

Federal decisions do not dictate the outcome of this case. But federal cases—including the United States Supreme Court's seminal

decision in *Upjohn* and its progeny—provide persuasive contributions to the development of the common law of the attorney-client privilege. *See Dike v. Dike*, 75 Wn.2d 1, 10, 448 P.2d 490 (1968) (explaining that RCW 5.60.060(2) is "merely declaratory of the common law") (citing *State v. Emmanuel*, 42 Wn.2s 799, 259 P.2d 845 (1953)); *see also Youngs v. PeaceHealth*, 179 Wn.2d 645, 653, 316 P.3d 1035 (2014) (adopting a "modified version of the *Upjohn* test" in the medical-malpractice context).

To the extent that the Court finds federal authority persuasive, it is significant that (1) *Upjohn* left open the question presented here, 449 U.S. at 394 n.3, and (2) the Ninth Circuit has never held that corporate counsel's communications with former employees are privileged. Instead, the Ninth Circuit has ruled that privileged communications between corporate counsel and an employee during the employee's employment remain privileged after the employee leaves the corporation. *See, e.g.*, *Admiral Ins. Co. v. U.S. Dist. Ct. for Az.*, 881 F.2d 1486 (9th Cir. 1989) (holding that statements made by two employees to corporate counsel before the employees resigned remained privileged after the resignation). There is no issue here regarding communications with counsel that took place when the coaches worked for the School District. The School

District asks this Court not only to apply federal law on the scope of a corporation's attorney-client privilege, but to expand upon it.

B. The Corporate Attorney-Client Privilege Does Not Apply to Communications with Former Corporate Employees.

Civil Rule 26(b)(1) limits the scope of discovery, allowing for discovery of anything material and relevant to the litigation except for privileged matters. *Dana v. Piper*, 173 Wn. App. 761, 770, 295 P.3d 305 (2013). The attorney-client privilege is one exception to the discovery of relevant information and has long been recognized as necessary to encourage "full and frank" communications between attorneys and their clients. *See Youngs*, 179 Wn.2d at 650–51 (citing *Upjohn*, 449 U.S. at 386). Like all privileges, however, the attorney-client privilege impedes investigation of the truth and therefore is strictly construed. *Dike*, 75 Wn.2d at 11. For example, courts do not permit the attorney-client privilege to hide otherwise discoverable facts simply because they have been incorporated into communications with counsel. *Youngs*, 179 Wn.2d at 653.

Moreover, not all communications with lawyers are protected by the privilege. The privilege protects only communications between a lawyer and her client that are both confidential and made for the purpose

of giving or obtaining legal advice. *See, e.g.*, *Morgan v. City of Federal Way*, 166 Wn.2d 747, 755–56, 213 P.3d 596 (2009) (holding that an attorney's report of an investigation into hostile work environment claims was subject to disclosure under the Public Records Act because the person objecting to the disclosure had no attorney-client relationship with the attorney investigator). The scope of the attorney-client privilege raises special problems in the context of corporate counsel's communications with corporate employees.

A corporation acts only through its constituents or employees, but the privilege does not extend to every communication between corporate counsel and corporate employees. *See Upjohn*, 449 U.S. at 394 (holding that the attorney-client privilege extends to communications between corporate counsel and the corporation's employees when the communications: (1) are with corporate counsel, acting as such; (2) are made at the direction of management; (3) are for the purpose of securing legal advice; and (4) concern matters within the scope of the employee's corporate duties).

In determining the scope of the corporate attorney-client privilege, this Court has considered whether protection of the communication at

issue is necessary to serve the "central policy concern" that supports the privilege. *See Youngs*, 179 Wn.2d at 664. Following the Court's reasoning in *Youngs*, the answer to the question presented here lies in whether extension of the corporate attorney-client privilege to communications with former corporate employees is necessary to advance the public policy concerns that animate the privilege. It is not. *See Peralta v. Cendant Corp.*, 190 F.R.D. 38, 40 (D. Conn. 1999) ("[W]holesale application of the *Upjohn* principles to former employees as if they were no different than current employees is not justified by the underlying reasoning of *Upjohn*.").

This Court has addressed communications with a corporate defendant's former employees before. In *Wright by Wright v. Group Health Hospital* the Court considered which corporate employees are "parties" for the purposes of the disciplinary rule limiting *ex parte* contacts with a represented party. 103 Wn.2d 192, 197, 691 P.2d 564 (1984). The Court held that the plaintiff's counsel was prohibited from having *ex parte* contact with "current" employees of the defendant who had managing authority sufficient to give them the right to speak for or bind the corporation. *Id.* at 201. The Court held that the rule did not

apply to contacts with former employees because they "cannot possibly speak for the organization." *Id.* In doing so, the Court rejected the argument that the former employees' role in the events triggering litigation was relevant to rule's application. The Court explained: "It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts." *Id.* at 200. That is not the purpose of the attorney-client privilege either. The School District's arguments that the significance of the former coaches' role in the events giving rise to this litigation justifies the extension of the privilege to their communications with counsel should be rejected for the reasons set forth in *Wright*.

Consistent with this Court's reasoning in *Wright*, the Restatement of the Law Governing Lawyers limits the scope of a corporation's attorney-client privilege to communications between counsel and an "an agent" of the organizational client. *See Restatement (Third) of the Law Governing Lawyers* § 73(2). The comments explain that a former employee is no longer an agent of the corporation and as a result, his or her communications with corporate counsel are not privileged. *See id.* cmt. e ("[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 . . . . Generally, that premise implies that persons be agents of the organization at the time of communicating.").

Numerous federal district courts are in accord. Confronted with the question of whether under *Upjohn* the corporate attorney-client privilege extends to counsel's communications with former employees, federal courts have repeatedly answered "No." *See U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp.2d 554 (E.D. Penn. 2004); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000); *Peralta*, 190 F.R.D. at 40; *Clark Equip. Co. v. Lift Parts Mfg. Co.*, No. 82 C 4585, 1985 WL 2917 (N.D. Ill. Oct. 1, 1985); *see also Barratt Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 126 F.R.D. 515, 518 (N.D. Ill. 1990) (concluding that Illinois law does not extend the corporate attorney-client privilege to former employees).

Cases decided in the employment discrimination context illuminate why this rule is correct. In *Peralta*, a plaintiff alleging employment discrimination sued his former employer. 190 F.R.D. at 39. Peralta's attorney subpoenaed for deposition Peralta's "former immediate

supervisor and allegedly the decision maker with regard to [his] claims of employment discrimination." *Id.* The supervisor no longer worked for the defendant employer. *Id.* Nonetheless, the defendant employer's attorney objected to Peralta's counsel asking questions about the supervisor's preparation for the deposition with the employer's counsel and about conversations between the employer's attorney and the supervisor during breaks in the deposition. *Id.*

The court held that "counsel for an employer" cannot claim privilege as to "its attorney's communications in preparing an unrepresented former employee for deposition by opposing counsel" or "such attorney's communications during the deposition about [the former employee's] testimony." *Id.* at 40–41. The Court explained that Peralta was entitled to learn whether the supervisor's communications with corporate counsel may have influenced the supervisor to "conform or adjust [the supervisor's] testimony to such information, consciously or unconsciously." *Id.* at 41.

The factual situation presented in *Peralta* is not uncommon. The testimony of a former supervisor or decision-maker is often key evidence in an employment discrimination case. When the supervisor is no longer

an employee of the corporate-employer defendant, plaintiffs are often required to secure the supervisor's attendance at a deposition by subpoena. *Wright*, the Restatement, and numerous federal courts agree that the former-employee, who is plainly not an agent of the corporation—speaking or otherwise—is not corporate counsel's client. *See, e.g.*, *Infosystems, Inc.*, 197 F.R.D. at 305 ("Former employees are not the client. They share no identity of interest in the outcome of the litigation . . . 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.") (quoting *Clark Equip. Co.*, 1985 WL 2917 at *5). The supervisor is a third-party witness and the defendant-employer's witness preparation should be discoverable.

"Privileges are recognized when certain *classes of relationships*, or certain classes of communications *within those relationships*, are deemed to be so important to society that they must be protected," even at the expense of the fact finding process. *State v. Maxon*, 110 Wn.2d 564, 567, 576 P.2d 1297 (1988) (emphases added) (declining to recognize a parent-child testimonial privilege). The purpose of any testimonial privilege is to foster socially valuable relationships. *See id.* at 567–68 ("Under

Washington law, communications made between husband and wife, priest and penitent, lawyer and client and doctor and patient are privileged and need not be disclosed in most judicial proceedings." (citing RCW 5.60.060)). After an employee has left the corporation, the employee does not act on behalf of, speak for, or represent the corporation, so the former employee's communications with corporate counsel are no longer "within the relationship" between the corporation and its attorney and are not privileged. *See also id.* at 573–74 (explaining the prerequisites for adoption of a common law privilege and discussing attorney-client privilege).

In addition to contradicting the great weight of authority, extending a corporation's attorney-client privilege to its former employees is unfair. Individual clients cannot assert privilege over communications with third-party witnesses in preparation for deposition. Skewing control over the information flow toward one party in a dispute cannot be proper. It is both unfair and contrary to public policy to extend to a corporation a broader attorney-client privilege than the one extended to individual litigants.

C. The Foreseeable Consequences of Unwarranted Extension of the Corporate Attorney-Client Privilege to Communications with Former Employees Are Conflicts of Interest and Misuse of the Privilege.

"Potential conflicts of interest are ubiquitous in the former employee-former employer relationship." Becker, *supra*, at 910. The potential conflicts are clearest when facts exposed in the litigation could subject the former employee to individual liability. *Id.* But there are more subtle problems as well.

First, a former employee can have interests that diverge from those of the former employer even if the former-employee is not subject to personal liability. For example, in a hostile work environment case, the employer might have interest in showing that any improper conduct was the result of one "bad apple." The former employee, who is the purported bad apple, may have an interest in showing that his or her conduct was consistent with or encouraged by the workplace culture. Testimony shedding light on those conflicting accounts would be highly relevant to the plaintiff's claims. Becker, *supra*, at 879 ("[A] former employee, especially a disgruntled one 'is precisely the witness most likely to shed light on internal corporate activities that otherwise would be difficult or impossible to uncover.'") (quoting George B. Wyeth, *Talking to the Other*

Side's Emps. and Ex-Emps., 15 Litig. 8, 12 (1989)). If the corporation's attorney-client privilege extends to its counsel's communications with the former employee, however, the corporation can limit the opposing party's ability to develop that testimony. Moreover, if the privilege belongs to the corporation, then only the corporation—not the former employee, can waive that privilege.

Second, any time that an attorney represents one client but allows another client to pay the fees associated with the representation, there is a substantial potential that the lawyer will elevate the interests of the paying client over those of the other client. *See* RPC 1.8(f). This puts the former employee in a difficult position. The former employee may be worried about the prospect of being deposed and accept corporate counsel's offer to represent him or her at a deposition for free, without any evaluation of whether his or her own interests are aligned with those of the former employer.

Here, the superior court found that there was a significant potential conflict and disqualified the School District's attorney from also representing the School District's former employees (the coaches). (CP 787–78.) The School District's subsequent assertion that its own attorney-

client privilege bars disclosure of its counsel's communications with its former employees is a thinly veiled attempt to circumvent that ruling.

Trial judges are generally unwilling to disqualify counsel from representing a client. As a matter of policy, this Court should not allow corporate parties to avoid the impact of a trial judge's decision to disqualify corporate counsel from representing former employees by subsequently claiming that its own privilege shields the disclosure of its counsel's communications with former employees. Moreover, the Court could provide needed guidance to both litigants and trial judges by recognizing the extent to which dual representation of a corporate client and its former employees is fraught with potential conflict and unwise.

Corporations have misused the attorney-client privilege to hide damaging facts. *See* Maura L. Strassberg, *Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege*, 37 Seton Hall L. Rev. 413, 432 (2007) (pointing to the tobacco companies' initial success in shielding damaging documents from disclosure based on over broad assertions of privilege). "[F]rivolous assertions of attorney-client privilege, whether successfully unmasked or never challenged, unacceptably harm opposing parties, the judicial system

itself, and all those who will seek or need vindication of their rights in the future." *Id.* at 432. Courts can discourage overbroad assertions of privilege by limiting the corporate attorney-client privilege to communications that must be protected in order to encourage the corporate client to make "full and frank" disclosures to its attorney. Corporate counsel's communications with former employees, especially for the purpose of preparing former employees to testify, do not meet that requirement.

IV. CONCLUSION

For all of the foregoing reasons, WELA respectfully requests that the Court clarify that the corporate attorney-client privilege does not apply to communications with former employees. Moreover, the Court should discourage corporate counsel from circumventing that rule by representing former employees for the limited purpose of a deposition, at least in situations where the corporation pays the fees associated with that representation.

RESPECTFULLY SUBMITTED AND DATED this 2nd day of October, 2015.

WASHINGTON EMPLOYMENT
LAWYERS ASSOCIATION

By: _____
Blythe H. Chandler, WSBA #43387
Jeffrey L. Needle, WSBA #6346

CERTIFICATE OF SERVICE

I certify that on October 2, October 2, 2015, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of October, 2015.

WASHINGTON EMPLOYMENT
LAWYERS ASSOCIATION

By: _____
Blythe H. Chandler, WSBA #43387