Exes and the Attorney-Client Privilege

By C. Evan Stewart

Taylor Swift has never been shy about dissing her ex-boyfriends. For example, one of her biggest mega-hits is entitled "We Are Never Ever Getting Back Together."[1] Obviously, the message is quite clear that, in her world, there is a clear demarcation between the status of being a boyfriend and an ex-boyfriend. This article will explore the notion of whether—for purposes of the attorney-client privilege—there is (or should be) a similar demarcation between corporate clients and their ex-employees.[2]

The Starting Point

In 1981, the U.S. Supreme Court strongly affirmed the privilege in the corporate setting in *Upjohn v. United States*.[3] The *Upjohn* Court stressed the importance of there being "full and frank communications between attorneys and their clients," and that such communications are necessary to enable a lawyer to give "sound and informed advice." The Court also concluded that the privilege "promote[s] broader public interests in the observation of law and the administration of justice." As a consequence of these policies and interests, the Court barred from disclosure to the Internal Revenue Service corporate counsel's fact-oriented communications with employees regarding an investigation into questionable payments made to foreign government officials; and given an attorney's need to render "sound and informed advice," the Court specifically rejected prior precedent limiting the privilege to only certain employees.[4]

As important and as helpful as the Supreme Court's decision has been, one area the Court left open was whether the privilege extends to communication with ex-employees. Seven of the 86 people interviewed in the *Upjohn* investigation were no longer employees at the time of their interviews. Although *Upjohn* asked that the privilege also cover those individuals, the Court declined to extend the privilege to them because the lower courts had not addressed the issue.[5] Chief Justice Burger, in his concurrence, thought that the act of declining was regrettable, arguing that a former employee should also be covered when he or she "speaks at the direction of management with an attorney regarding conduct or proposed conduct within the scope of employment."[6]

Extending *Upjohn*

In the aftermath of *Upjohn*, a number of courts have decided to extend its rationale to former employees, so long as the privileged communications related to their tenure at the company (i.e., consistent with the Burger concurrence).[7] And the *Restatement* has also opined that communications with a former agent (a/k/a ex-employee) are privileged, *but only so long as* "the former agent has a continuing legal obligation to the principal organization to forward the information to the organization's lawyer."[8]

At the same time, several other courts have expressly declined to expand *Upjohn* to cover ex-employees.[9] And now another court has recently joined the latter's ranks, to a fair amount of brouhaha.

Washington Goes Rogue?[10]

On October 20, 2016, the Supreme Court of Washington—in an *en banc* decision, by a five to four vote—ruled that the attorney-client privilege does not extend to ex-employees. In *Newman v. Highland School District No. 203*,[11] a high school quarterback suffered a permanent brain injury in a football game; he (and his parents) thereafter sued the school district for negligence. Lawyers for the school district interviewed several former coaches and appeared on their behalf at their depositions. Plaintiffs moved to disqualify the lawyers on the ground of a conflict of interest. The trial court denied the motion, but also ruled the defense counsel could not "represent non-employee witness[es] in the future." Plaintiffs then sought discovery of communications between defense counsel and the former coaches during time periods when the coaches were unrepresented by defense counsel. The trial court granted that motion, ordering the school district to identify "exactly when defense counsel represented each former employee" and barring those lawyers from asserting the privilege with respect to any communications not encompassed by the representation period. At the same time, the trial court (i) did *not* rule that the communications during the representation period (i.e., the depositions) were *not* protected by the privilege; and, (ii) did *not* take issue with the notion that any communications with counsel *during* the coaches' employment were fully protected by the privilege.[12] The school district appealed the trial court's ruling to the Washington Supreme Court.

The majority decision for the *en banc* Washington Supreme Court started off by correctly noting that the U.S. Supreme Court expressly declined to resolve the ex-employee issue in *Upjohn*. It then ruled that the school district's argument to extend *Upjohn's* rationale was flawed "because former employees categorically differ

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from current employees."[13] Once the employer-employee agency relationship ends, "the former employee can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation."[14] And, as such, "a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party."[15]

The *Newman* majority, in rejecting the extension/expansion of *Upjohn*, noted that some courts have in fact gone in a different direction, based upon "the corporation's perceived need to know what its former employees know."[16] But it found this argument "unpersuasive" because that concern is universal—not only would a defendant perceive such a need: "[s]o might a plaintiff, so might a government."

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The *Newman* dissent strongly disagreed with the majority's analysis and outcome. The entirety of the dissent's position, however, was based upon a false construct: the dissent repeatedly (at least fourteen times) invoked *Upjohn's* "flexible"/"functional" approach to the corporate attorney-client privilege. But such an approach is simply *not* what the U.S. Supreme Court did; rather, the Court (i) expressly ruled that *all* current Upjohn employees were covered by the privilege and (ii) expressly declined to extend the privilege to *any* ex-employees. The notion that the U.S. Supreme Court provided a "functional framework for lower courts" to decide the issue for ex-employees in the aftermath of *Upjohn* has no jurisprudential grounding whatsoever, and the *Newman* dissent provided none.[17]

To its credit, the *Newman* dissent did "acknowledge that *Upjohn's* policies and purposes do not require us to consider former employees exactly as we consider current employees"—i.e., no agency relationship, no duties of confidentiality, loyalty, etc. But, in the dissent's view, those considerations (and the *Restatement (Third) of the Law Governing Lawyers*) are "incorrectly framed statements of the law, and [. . .] are inconsistent with the functional framework of *Upjohn*."

The Immediate Aftermath of *Newman* (a/k/a "Fake News")

The reaction to the *Newman* decision by various talking heads in the media was as breathless as it was wrong.[18] One oft-quoted commentator called the majority's decision incorrect, inconsistent with *Upjohn*, and . . . "troubling": "the decision is a bad idea for Washington and bad for other courts to follow."[19] Another oft-quoted commentator similarly opined that the majority's decision is inconsistent with *Upjohn* and "takes the distinct minority view."[20] The foregoing punditry may constitute the "conventional wisdom" (at least at first blush), but what is the "straight scoop"?

The "Straight Scoop"

The "straight scoop" consists of at least two things. The first is the state of the law *vis-à-vis* ex-employees; and it is fair to say that there currently exist four states, three of which are on the right side of the privilege. As an initial matter, the *Upjohn* Court's decision not to extend the privilege to ex-employees is still what the Supreme Court's take is on this subject; *nothing* has happened over the last 36 years to change that state of affairs. Thus, it is simply incorrect factually to say that the *Newman* majority's decision is "inconsistent" with *Upjohn*.[21]

Next up, the *Restatement's* view is also undoubtedly correct. For example, if an ex-employee has—as a matter of fact—binding legal obligations to keep company information gained during his or her employment confidential and to cooperate with respect to said information with company counsel (obligations, for example, set forth in a severance agreement), then those "continuing legal obligations" should, of course, be binding and legally enforceable.

The third and fourth states of play (the conflicting courts) are opposite images of each other, and only one can be correct. The problem with those courts that have extended *Upjohn* to cover ex-employees is that they do not understand *Upjohn* or the basic building blocks of the privilege itself.[22] First off, the rationale proposed to justify the extension—the "need to know"—is not rooted anywhere in the privilege, and (quite frankly) is absurd on its face. As the *Newman* majority correctly noted, every party to a litigation has a "need to know"; that "need" does not constitute a basis to protect from disclosure information or communications (of whatever nature). Equally important (and also, as pointed out by the *Newman* majority) is the fact that at least one of the 5 Cs is missing; [23]—in the case of ex-employees, the missing C is that there is *no client*. Thus, the *Newman* majority was on the money in observing that (in the absence of anything else) "a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party."

But while this last point is clearly correct, it is not the end of the inquiry concerning ex-employees and whether there *can be* instances where such individuals *could be* covered by the privilege. To understand this notion, it is necessary to point out how an indecipherable (and wrong) decision by the Washington trial court in *Newman* high-

lights the everyday process of corporate counsel representing the company *and* the legal interests of employees (both current and former). It is also necessary to identify a handful of courts that (like the Washington trial court) do not understand or like that everyday process.

The *Newman* trial court did *not* find that the school district's lawyers had a conflict in representing the coaches at their depositions, or that they had committed an ethical violation in doing so; indeed, it is well-established that "[a]ssuming there is no conflict of interest, defense counsel… may represent former employees."[24] At the same time, the trial court opined that the multiple representations reflected "a very poor decision," and ruled that the lawyers could not represent the coaches going forward. This seemingly Solomonic decision was simply wrong—either the earlier representation was wrong, unethical, and should have been sanctioned, or the earlier representation was not improper, not unethical, and could continue.[25]

So why did the *Newman* trial court err in this regard, an error that then teed up the ex-employee/privilege issue for the Washington Supreme Court? I believe it is because it is one of a handful of judicial decisions that reflect a fundamental misunderstanding of (and thus antipathy to) corporate counsel *also* representing individual employees (current and ex) when there is no conflict of interest by and between these multiple clients. The practice of representing corporations and individual employees (assuming no conflict of interest) goes on all the time, is perfectly hunky dory, and is employed by experienced lawyers of all stripes (including me).[26] But some courts do not like it, and lawyers who (like me) frequently engage in this practice need to be on notice of these outlier judicial decisions.

One such case is *Aspgren v. Montgomery Ward & Co.*,[27] in which a federal judge in Illinois wrote that a lawyer may "create an appearance of impropriety" by offering to represent a former employee gratis, "because such an offer may encourage a former employee to seize on the opportunity of free representation without evaluating the advantages of independent counsel." Of course, if that were correct—and it is *not*—the exact same "appearance of impropriety" would also cover offering to represent *current* employees as well.

In a somewhat related vein is the infamous case of *Rivera v. Lutheran Medical Center*.[28] While faithful readers of this august *Journal* may remember that I have (more than once) tried to take a two-by-four to this truly wacky decision,[29] and while there is judicial authority directly contrary to *Rivera*,[30] a brief reminder of that case is in order.

In *Rivera*, a prominent law firm was retained by a hospital to defend a sexual/employment discrimination claim. Shortly thereafter, the firm contacted current and former employees who had direct, first-hand knowledge of the facts. Assuring those individuals that the firm saw no conflict of interest between them and the hospital, the lawyers offered to represent each of them at the hospital's expense, and all the individuals agreed. In the early stages of discovery, the plaintiff's lawyer discovered the multiple representation arrangement and moved to disqualify the law firm from representing the individuals, citing purported ethical violations.

The Kings County (New York) trial judge did not agree that the firm had violated any conflict of interest rules (there was in fact no evidence that the multiple representations constituted a potential or actual conflict of interest). Instead, the judge found that the lawyers had violated the "non-solicitation" rule (which today is Rule 7.3). That rule bars attorneys from soliciting clients directly (e.g., in person) unless the prospective client "is a close friend, relative, former client or current client."

By its explicit rationale (*see* Comment 1 to ABA Model Rule 7.3), this rule has *no* application to the *Rivera* situation; the rule is expressly designed to prohibit ghoulish ambulance chasing. Unfortunately, on appeal, the Appellate Division, Second Department affirmed the trial judge's ruling in a terse, succinct, and short-winded opinion.

Rivera is, of course, dead wrong.[31] At the same time, however, it is obviously a precedent that plaintiff's counsel might try to latch onto to make life difficult for some defense lawyers in the future. And not only does *Rivera* threaten wholly proper multiple representations, its wacky reasoning also underscores hostility to the privilege attending to such representations. As Michael Corleone once implored, "Just when I thought I was out . . . they pull me back in."[32]

Endnotes

1. This song went quintuple platinum, and is one of the best-selling singles in the world. It appears on Swift's fourth album *Red* (Big Machine 2012) (written by T. Swift, M. Martin & Shellback). And in her prior album, *Speak Now* (Big Machine 2010), she trashed another former lover, John Mayer, with the thinly veiled song about their breakup: "*Dear John*" (written by T. Swift). That song "really humiliated" Mayer and "made [him] feel terrible." *Rolling Stone* (June 6, 2012). Mayer, of course, is not the only recipient of a "*Dear John*" song. *See, e.g.*, "*Dear John Letter*" by Whitney Houston (*Just Whitney* (Arista Records 2002) written by K. Briggs, D. Reynolds, P. Stewart & W. Houston); "*A Dear John Letter*"—the original single was by Jean Shepard and Ferlin Husky (Capitol Records 1953) written by B. Barton, F. Owens & L. Talley—this song has been covered by many artists, including Pat Boone, who had a #44 hit with it in 1960 (Dot Records).
2. Because of widespread confusion concerning the privilege—among practitioners, legal academics, and judges (with a few notable exceptions, e.g., Judge Pierre Leval)—I have been writing and speaking about the privilege for over 30 years. *See, e.g.*, "*Defending the Attorney-Client Privilege*," Case & Comment (1986); "*Whither the Attorney-Client Privilege?*" New York Law Journal (Oct. 22, 1990); "*The Corporate Attorney-Client Privilege: Is Nothing Sacred?*" The Corp. Crim. & Const. L.R. (April 5, 1991); "*Corporate Counsel and Privileges: Going, Going…*," New York Law Journal (July 11, 1996); "*The Attorney-Client Privilege: The Best of Time, the Worst of Times*," The Professional Lawyer (1999); "*The Attorney-Client Privilege and Email: Strange Bedfellows*?" The Computer and

Internet Lawyer (March 2007); "*Will Waiving the Privilege Save It*?," New York Business Law Journal (Spring 2007); "*Pandora's Box and the Bank of America*," New York Law Journal (Nov. 4, 2009); "*Attorney-Client Privilege: Ohio Takes a Bite Out of the Big Apple*," New York Law Journal (Sept. 7, 2012); "*Attorney-Client Privilege: Misunderestimated or Misunderstood*?," New York Law Journal (Oct. 20, 2014); "*The D.C. Circuit: Wrong and Wronger*," New York Business Law Journal (Winter 2015).

3. *See generally Upjohn v. United States*, 449 U.S. 383 (1981).

4. The Supreme Court subsequently reinforced the teachings of *Upjohn* in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). In *Swidler & Berlin*, the Court rejected the argument that the attorney-client privilege could be vitiated after the client's death in certain criminal proceedings. Citing the broad purposes of the privilege, the Court observed that "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel" and that "[w]ithout assurance of the privilege's posthumous application the client may very well not have made disclosures to his attorney at all."

5. *See Upjohn*, 449 U.S. at 394, *supra* note 3.

6. *See id.* at 403.

7. *See, e.g., Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987); *Denver Post Corp. v. Univ. of Colo.*, 739 F.2d 874 (Colo. 1987); *Allen v. McGraw*, 106 F.3d 582 (4th Cir. 1997); *United States v. Chen*, 99 F.3d 1495) (9th Cir. 1996); *Shew v. Freedom of Info. Comm'n*, 714 A.2d 664 (Conn. 1998); *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999); *Surles v. Air France*, 2001 U.S. Dist. LEXIS 10048, at *17 (S.D.N.Y. July 19, 2001); *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554 (E.D. Pa. 2004); *Winthrop Res. Corp. v. CommScope, Inc. of N. Carolina*, 2014 WL 5810457, at *3 (W.D.N.C. Nov. 7, 2014).

8. *Restatement (Third) of the Law Governing Lawyers*, Section 123, comment e (2000). *See Shew v. Freedom of Info. Comm'n*, 714 A.2d 664 (Conn. 1998) (follows the *Restatement* standard).

9. *See, e.g., Clark Equipment Co. v. Lift Parts Manufacturing Co.*, 1985 U.S. District LEXIS 15457, at * 14 (N.D. Ill. Sept. 30, 1985); *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89 (S.D. Cal. 1987); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000). *See also* and *compare Connolly* (attorney's work product is not waived when shown to ex-employee) with *Clark Equipment* (attorney's work product is waived when shown to ex-employee).

10. The State of Washington often charts its own, idiosyncratic path. Witness the Electoral College vote of 2016 –Hillary Rodham Clinton won the State's popular vote, but four electors were "faithless": three voted for Colin Powell, and one voted for Faith Spotted Eagle! Other "faithless" electors in 2016 were one in Hawaii for Bernie Sanders; two in Texas—one for Ron Paul and one for John Kasich.

11. *See generally Newman v. Highland Sch. Dist. No. 203*, 186 Wash. 2d 769, 381 P.3d 1188 (2016). The intermediate Washington State Court, the Court of Appeals, declined discretionary review of the trial court's ruling; the entire Supreme Court, however, decided to weigh in.

12. There was no dispute between the parties on either of these two points. *Id.* at n.1. *See In re Coordinated Pretrial Proceedings in Petrol. Prods. Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999). Nor was there any challenge to the trial court's ethical rulings. As such, the only issue up on appeal was whether the pre-representation period was immune from discovery.

13. The Washington Supreme Court was evaluating this issue not only in the context of *Upjohn* but also upon its own prior precedent, which tracks *Upjohn. See Youngs v. PeaceHealth*, 179 Wash.2d 645, 316 P.2d 1035 (2014).

14. For this proposition, the *Newman* majority cited (correctly) the *Restatement*.

15. For this proposition, the *Newman* majority cited the decisions identified, *supra* note 9.

16. The *Newman* majority cited the decisions identified, *supra* note 7.

17. The above-cited language from the dissent purports to have precedential authority. Such authority, however, is merely Chief Justice Burger's concurrence. *See* note 1 in the dissenting opinion. To the extent the *Upjohn* Court talked about a "case-by-case" basis, the decision said only this: "Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas." 449 U.S. at 396. That off-hand commentary hardly invited lower courts to expand *Upjohn's* ruling to include ex-employees.

18. *See* J.C. Rogers, *No Privilege for Lawyer's Talks With Ex-Employees*, ABA/BNA Lawyer's Manual on Professional Conduct 627 (November 2, 2016).

19. This commentator is a lawyer who works for the Association of Corporate Counsel, Amar Sarwal. Readers of this space will know that my views and that of Mr. Sarwal are not terribly in sync. *See* C.E. Stewart, *The D.C. Circuit: Wrong and Wronger*!, New York Business Law Journal 33-34 n.19 (Winter 2015).

20. This commentator is a lawyer who has published a treatise on the attorney client privilege and work product doctrine, Thomas Spahn. Readers of this space will know that my views and that of Mr. Spahn are not terribly in sync and I do not rely upon his treatise. *See id*. at 34, n. 45.

21. *See supra* notes 17-20 and accompanying text.

22. Those decisions are set forth *supra* note 7.

23. It is well-settled, unambiguous law that there must be: (1) a client; (2) a communication; (3) confidentiality; (4) counsel (an attorney); and (5) counsel (the giving of legal advice by an attorney). *See* C.E. Stewart, "*Attorney-Client Privilege: Misunderestimated or Misunderstood*," New York Law Journal (October 20, 2014). All of the Five C's must be present for the privilege to exist.

24. *See* M. McRae, K. Smith, and A. Raimundo, *Scope of Employment*, Los Angeles Lawyers 23 (April 2013). Accord M.J. Dell, *Ethical Considerations in the Representation of Multiple Clients*, Practicing Law Institute (May 7, 2015); ABA Formal Opinion No. 08-450 (April 9, 2008). *See also Holloway v. Arkansas*, 435 U.S. 475, 482 (1978).

25. As noted earlier (*see supra* note 12 and accompanying text), this ruling was not challenged by the parties and was not an issue up before the Washington Supreme Court.

26. *See supra* note 24. Of course, if there *is* a conflict of interest between the corporate client and an individual employee (current or ex), the corporate lawyer must stand down from a multiple representation. *See* C.E. Stewart, *Thus Spake Zarathustra (and Other Cautionary Tales for Lawyers)*, New York Business Law Journal (Winter 2010).

27. *See Aspgren v. Montgomery Ward & Co.*, 1984 U.S. Dist. LEXIS 21892, at *10-13 (N.D. Ill. Nov. 19, 1984).

28. *See Rivera v. Lutheran Medical Center*, 22 Misc. 3d 178, 866 N.Y.S. 2d 520 (Sup. Ct. Kings Co. 2008), *aff'd*, 73 A.D. 3d 891, 899 N.Y.S. 2d 859 (2d Dept. 2010).

29. *See* C.E. Stewart, *Squaring the Circle: Can Bad Legal Precedent Just Be Wished Away?*, New York Business Journal (Winter 2014); C.E. Stewart, *Just When Lawyers Thought It Was Safe to Go Back Into the Water*, New York Business Law Journal (Winter 2011).

30. *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, 2010 WL 1558554 (W.D. Okla. April 19, 2010); *FHFA v. Nomura Holding America Inc., et al.*, 11 Civ. 6201 (S.D.N.Y. March 4, 2015).

31. Beyond the articles cited *supra* in note 29, *see also* C.E. Stewart, *The Rivera Precedent: What You Don't Know Can Hurt You*, Business Law Today (May 2015); C.E. Stewart, *How a Bad Ruling Can Spoil a Whole Bunch of Cases*, New York Law Journal (January 8, 2009).

32. Unfortunately, this quote is from *Godfather Part III* (Paramount 1990), which is a terrible movie. On the other hand, all of life's important lessons can be learned from *Godfather* (Paramount 1972) and *Godfather Part II* (Paramount 1974).