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Brandon Villa

CHECK YOUR PRIVILEGE: THE BIG BLOW TO CORPORATE INTERNAL INVESTIGATION IN THE POST-*UPJOHN* ERA

BRANDON VILLA

Abstract

The attorney-client privilege is the oldest privilege recognized by common law. In the corporate context, the attorney-client privilege exists between control group-officers and corporate counsel. That privilege extends to communication collected from lower level employees which encourages the frank communication to gather all relevant information to adequately advise the corporate client. But does information gathered from an employee after termination enjoy that privilege? The Upjohn rationale for the attorney-client privilege erodes when the sole focus of privilege focuses on an attorney-client relationship. Specifically, the Washington Supreme Court deviated from the Upjohn rationale which corrodes the fundamental principles of the attorney-client privilege. This comment explains the long-standing tradition that attorney-client privilege extends beyond the agency relationship and evaluates how the Washington Supreme Court's latest opinion frustrates the spirit of the Upjohn and privilege rationales.

I. INTRODUCTION

Imagine – as corporate counsel – notice is received of a complaint alleging company misconduct. An initial inquiry reveals that an internal investigation must be launched in order to determine the legitimacy of the complaint. The process begins with informing the client-corporation of the anticipated internal

investigation. The attorney-client privilege is a rule of evidence which protects the confidentiality of communications between an attorney and a client.[1] As a general rule, the attorney-client privilege bars an attorney from disclosing information to anyone outside the client.[2] Evaluating whether communications are privileged becomes convoluted when servicing a client-corporation.[3] Application of the privilege to the communications between an attorney and a corporate client, a legal entity, is more complicated because "any number of people can act for or speak on behalf of the corporation, including its officers, directors, employees or other agents."[4] Thus, the identity of the "client," may not be clear and courts have grappled with how to define the "client," in the corporate context for purposes of the application of the privilege.[5]

This comment will discuss the historical significance of the attorney-client privilege in the context of corporate internal investigations.[6] It will address whether protections established in *Upjohn Co. v. United States,* 449 U.S. 383 (1981) extend to post-employment communications with former employees. Specifically, it will discuss how the first and foremost goal of an attorney performing an investigation is to take all necessary steps to ensure that the investigation is privileged to the full extent permitted by law and how that goal has become somewhat muddled following *Newman v. Highland Sch. Dist.,* 281 P.3d 1188 (Wash. 2016).[7] Finally, this comment will propose that post-employment communications with former employees should enjoy privilege only when the conduct of the former employee, while employed, embroiled the company in liability.

II. BACKGROUND

Common law has embraced the attorney-client privilege as the oldest privilege for confidential communications.[8] The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and clients.[9] The privilege

1. CAROLE BASRI & LUKE SEMAR, CORPORATE COMPLIANCE PRACTICE GUIDE, § 19.02 (2018).

2. *See* DAN K. WEBB, ROBERT W. TARUN & STEVEN F. MOLO, CORPORATE INTERNAL INVESTIGATIONS § 6.02 (Law Journal Press 2017) (defining information (1) a communication; (2) made in confidence; (3) between a person who is, or is about to become, a client; and (4) a lawyer; (5) for the purpose of obtaining legal advice or assistance).

3. *Id.* at 6-18.

4. BASRI & SEMAR, *supra* note 1, at § 19.02.

5. *Id.*

6. WEBB, TARUN & MOLO, *supra* note 2, at 6-18.

7. Newman v. Highland Sch. Dist., 281 P.3d 1188, 1189 (Wash. 2016).

8. Upjohn Co. v. United States, 449 U.S. 383 (1981).

9. *See* WEBB, TARUN & MOLO, *supra* note 2, at § 6.03 (discussing that there are four primary reasons support imposing this virtually absolute rule of

permits an attorney to conduct a robust investigation in order to adequately advise her client of the issues being investigated.[10] In *Upjohn*, the Supreme Court held that the attorney-client privilege extends to corporate clients and it rests on the ability of the attorney to gather *all* information that relates to the client's need for representation.[11] An attorney's inadequate gathering of information can frustrate her professional mission to deliver complete and informed advice to the client.[12] In the corporate context, it will frequently be employees beyond the control group-officers and agents responsible for directing the company's actions in response to legal advice who will possess the information needed by the corporation's attorney.[13] The *Upjohn* court considered several factors to determine the scope of the attorney-client privilege in the corporate setting.[14]

As part of the internal investigation, counsel may speak to current and sometimes former employees to obtain all necessary information to inform the client-corporation.[15] The U.S. Supreme Court's decision in *Upjohn* clarified that interviews between

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confidentiality. First, it encourages clients to communicate fully and frankly with their lawyers and to seek legal assistance early. Second, it assists lawyers in providing competent counsel, which is possible only through a thorough understanding of the facts and motivations involved in a matter. Third, it promotes compliance with the law by allowing lawyers and clients to discuss issues freely in an effort to resolve legal problems. Fourth, it promotes the ultimate ends of justice by fostering informed, and therefore vigorous, advice and advocacy).

10. Upjohn Co. v. United States, 449 U.S. 383, 388 (1981).

11. *Id.* at 388.

12. *Id.*

13. *See id.* at 390

> (stating: Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties).

14. *See* Youngs v. PeaceHealth, 179 Wash. 2d 645, 650-51 (2014) (citing *Upjohn Co.,* 449 U.S. at 394) (discussing the factors to determine scope of attorney-client privilege including that investigations: (1) were made at the direction of corporate 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-echelon 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).

15. *See* Palmina M. Fava, Mor Wetzler & Morgan A. Heavener, *Where Privilege Protection Ends in Internal Investigations*, LAW360, 1 (Mar. 22, 2013, 12:39 PM) www.law360.com/articles/426424/where-privilege-protection-ends-in-internal-investigations (discussing as part of most internal anti-corporation investigations, counsel will have reason to speak to current and sometimes former employees in an effort to understand the events under investigation).

corporate-counsel and non-management corporate agents may be privileged and that privilege belongs to the corporation.[16] Mention of "former employees" in the opinion was limited to the concurring opinion by Chief Justice Burger who proposed a general rule that when an employee "or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment," the communication is privileged.[17] To preserve privilege to the corporation, corporate-counsel must issue "*Upjohn* warnings" to its employees.[18]

The *Upjohn* doctrine has been settled law for over thirty-five years.[19] However, the Washington Supreme Court in *Newman* was of the opinion that *Upjohn* did not expressly answer the question of whether the attorney-client privilege extends to post-employment communications between corporate counsel and former employees.[20] There, the court held that post-employment communications with former employees are not privileged under the *Upjohn* doctrine.[21] Instead, the court concluded that *Upjohn* does not justify applying the attorney-client privilege outside of the employer-employee relationship.[22] The "bright line" test enunciated in *Newman* appears to have struck a substantial blow to the *Upjohn* privilege and the way investigations are organized and performed.[23]

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16. *See id.* at 4 (discussing that: (1) the communications are necessary for counsel's representation, (2) concern matters within the employee's corporate duties, and (3) are kept confidential. Once the privilege is established, any determination of whether to waive privilege rests with the corporate decision maker(s), which may be senior management or the board of directors); *see also Upjohn*, 449 U.S. at 402 (Burger, W., concurring) (expressing the view that the court, although properly holding that the communications in the case at bar were protected by the attorney-client privilege, should have made clear that, as a general rule, a communication is privileged at least when an employee or former employee speaks with an attorney at the direction of the management regarding conduct or proposed conduct within the scope of employment, provided the attorney is one authorized by the management to inquire into the subject and is seeking information to assist counsel in evaluating whether the employee's conduct has bound or would bind the corporation, assessing the legal consequences, if any, of that conduct, or formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.).

17. *Upjohn*, 449 U.S. at 402 (Burger, W., concurring).

18. *See id.* at 394 (requiring that in order to enjoy the Upjohn privilege, the court must determine that (1) communications were made by direction of superiors to obtain legal advice, (2) communications contained information needed by corporate counsel to form legal advice, (3) the information communicated was within the scope of the employees corporate duties, (4) employee was aware that the reason for communicating was for the corporations benefit and behalf, and (5) communications were ordered to be kept confidential and remained confidential).

19. *Id.*

20. *Newman*, 281 P.3d at 1191.

21. *Id.* at 1189.

22. *Id.* at 1191.

23. *See* People v. Riccardi, 281 P.3d 1, 11 (Cal. 2012) (quoting that

The Supreme Court of Washington's decision certainly changes the rules of the road for internal investigations. Or does it? The purpose of this comment is to analyze *Newman* and *Upjohn*, and then determine how *Newman* affects performing an attorney-led investigation.

A. Summary of the Newman Decision

Newman involved an investigation about a serious personal injury case.[24] Newman brought suit against Highland School District ("Highland") on behalf of Matthew Newman who suffered a brain injury at football practice.[25] The following day, his coach made him play in a football game which exacerbated his condition and resulted in permanent brain injury.[26] Prior to trial, Highland's counsel interviewed several former employee coaches and appeared on their behalf at their depositions.[27] The trial court denied Newman's motion to disqualify Highland's counsel from representing the former coaches, which claimed a conflict of interest under local rules of professional conduct.[28] Newman then sought discovery concerning communications between Highland's counsel and its former coaches.[29] Highland moved for a protective order to shield those communications, asserting attorney-client privilege.[30] The court denied the protective order and directed Highland to respond to Newman's discovery requests.[31] The issue on appeal before the Washington Supreme Court was whether post-employment communications between former employees and corporate counsel received protection under the *Upjohn* doctrine.[32] The *Newman* court relied on *Upjohn* as the seminal case for interpreting corporate-client privilege.[33] Highland argued that *Upjohn* is a flexible approach which encompasses post-employment interviews and communications with former employees.[34] The Washington Supreme Court rejected this argument because the test

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Highland's argument for extending the attorney-client privilege to its communications with the former coaches emphasizes that these former employees may possess vital information about matters in litigation, and that their conduct while employed may expose the corporation to vicarious liability. These concerns are not unimportant, but they do not justify expanding the attorney-client privilege beyond its purpose).

24. *Newman*, 281 P.3d at 1189.

25. *Id.*

26. *Id.*

27. *Id. (*determining that Highland's counsel created a conflict of interest when counsel appeared for the former employee coaches).

28. *Id.*

30. *Id.*

30. *Id.*

31. *Id.*

32. *Upjohn Co.*, 449 U.S. 383.

33. *See id.*

34. People v. Winbush, 387 P.3d 1187, 1193 (Cal. 2017).

was beyond the scope of the test established in *Upjohn*.[35]

The Washington Supreme Court held that when the employer-employee relationship terminates, the agency relationship terminates.[36] An agency relationship entails a shared duty between the employee and employer.[37] Without an agency relationship, the former employee can no longer bind the corporation. Thus, the attorney no longer owes duties of loyalty, obedience, and confidentiality to the corporation.[38] The *Newman* court reasoned that without a duty to the employer, the former employee is indistinguishable from third-party witnesses who may be freely interviewed by either party.[39] Therefore, *Newman* limits the normal (or expected) reach of the *Upjohn* doctrine to current employees.[40]

B. The Upjohn Doctrine Revisited

To better understand the reasoning of *Newman*, a thorough analysis of *Upjohn* is in order. In *Upjohn*, foreign subsidiaries of defendant-corporation made "questionable payments" to a foreign government.[41] Corporate counsel began an internal investigation and sent a questionnaire to all foreign managers requesting details regarding the alleged payments.[42] Counsel believed the questionnaires were protected under the attorneys' work product, as the questionnaires were prepared in anticipation of litigation.[43] The Sixth Circuit Court of Appeals disagreed.[44] Instead, the Sixth Circuit applied the control group test,[45] holding that the privilege

35. *Id.*

36. *Id.* at 1192-93 (quoting that everything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship. 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).

37. *See* Peralta v. Cendant Corp., 190 F.R.D. 38, 41 n.1 (D. Conn. 1999) (stating "[a]ccording to the Restatement (Third) of the Law Governing Lawyers [§ 73 cmt. e], the attorney-client privilege would not normally attach to communications between former employees and counsel for the former employer" in the absence of "a continuing duty to the corporation" based on agency principles); *see also* Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303, 306 (E.D. Mich. 2000) (recognizing "there may be situations where the former employee retains a present connection or agency relationship with the client corporation" that would justify application of the privilege).

38. *Id.*

39. *Newman*, 281 P.3d 1188.

40. *See id.* at 1198 (citing that although we follow a flexible approach to application of the attorney-client privilege in the corporate context, we hold that the privilege does not broadly shield counsel's post-employment communications with former employees).

41. *Upjohn Co.*, 449 U.S. at 383.

42. *Id.*

43. *Id.*

44. *Id.* at 388.

45. *Id.* at 390.

applied to high-level executives and board members only.[46] Pursuant to the control group test, mid to low-level employees were excluded from the privilege.[47]

The U.S. Supreme Court explicitly overruled the control group test adopted by the Sixth Circuit.[48] The Supreme Court held that the test formulated by the Sixth Circuit overlooked the underlying purpose of the attorney-client privilege, which is to encourage "full and frank communication" between attorneys and their clients.[49] The *Upjohn* privilege promotes a broader public policy to ensure attorneys adequately counsel their clients.[50] Attorney-client privilege exists to not only protect the attorney in providing professional advice, but also to allow the client to give information to the lawyer to enable her to "provide sound and informed advice to the client."[51] The Supreme Court held that a witness protected by the privilege will likely disclose more complete, pertinent information as a result of such protection.[52]

Upjohn Company's low to middle-level managers and agents embroiled the company in bourgeoning liability.[53] In response, corporate-counsel conducted an internal investigation to explore the employees' potential misconduct.[54] The Supreme Court held that middle-level and lower-level employees can embroil the corporation into serious legal difficulties.[55] The Court also held that these employees possess relevant information the corporate counsel needs to provide adequate advice to the corporate-client.[56] The potential information the non-executive can give to the counsel is essential in counsel's pursuit to provide adequate advice and guidance to the client.[57] The exclusion of non-executives from the privilege exception frustrates the underlying purpose of the attorney-client privilege because counsel will be faced with a "Hobson's choice."[58] The attorney will be forced to either interview former employees in which privilege may not apply or solely interview top-level officials.[59] This Hobson's choice is problematic

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *See* Susan J. Becker, *Conducting Informal Discovery of A Party's Former Employees: Legal and Ethical Concerns and Constraints*, 51 MD. L. REV. 239, 240 (1992) (asserting that former employees often possess information that can be helpful and even vital to the resolution of anticipated or pending litigation involving the employer).
56. *Upjohn Co.*, 449 U.S. at 388.
57. *Id.*
58. *Id.*
59. *Id.*

because if counsel only interviews top level employees, "he or she may find it extremely difficult, if not impossible, to determine what happened."[60]

The *Upjohn* court did not address the issue of whether conversations with former employees is protected under privilege.[61] But, Chief Justice Burger, in his concurring opinion, reasoned that conversations with former employees should enjoy privilege in some contexts.[62] However, communications would be privileged between a former employee and the client's corporate counsel if the communication involves conduct or information which occurred within the scope of the former employee's employment.[63] The privilege may apply to the former employees if: (1) their conduct has bound or would bind the corporation; (2) there are legal consequences arising from the former employee's conduct; or (3) counsel forms appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.[64] Under this framework, post-employment communications with witnesses, including former employees, should enjoy privileged protections because conduct of former employees can embroil the corporation in difficulties.[65]

C. The Treatment of Former Employees After Upjohn and Before Newman

Since *Upjohn*, the majority of courts have adopted Chief Justice Burger's approach of affording attorney-client privilege to former employee communications in certain contexts.[66] For

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 609 (CA8 1978) (en banc); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-492 (CA7 1970), aff'd by an equally divided Court, 400 U.S. 348 (1971); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1163-1165 (SC 1974).
66. *See Mathias v. Jacobs*, 197 F.R.D. 29 (S.D.N.Y. 2000) (holding that privilege applied to former employees); *Infosystems, Inc.*, 197 F.R.D. 303 (affirming that there may be situations where the former employee retains a present connection or agency relationship with the client corporation, or where the present-day communication concerns a confidential matter that was uniquely within the knowledge of the former employee when he worked for the client corporation, such that counsel's communications with this former employee must be cloaked with the privilege in order for meaningful fact-gathering to occur); Better Gov't Bureau v. McGraw (In re Allen), 106 F.3d 582, 606 (4th Cir. 1997) (former employee need not answer questions concerning interview with former employer's counsel); In re Coord. Pretrial Proceedings in Petrol. Prods. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (same); *Peralta*, 190 F.R.D. at 40 (finding communications between former employee and corporate counsel privileged); Surles v. Air France, 2001 U.S. Dist. LEXIS 10048 at 18 (S.D.N.Y. July 17, 2001) (stating "[a]dditionally, any

instance, in *Hanover Insurance Co. v. Plaquemines Parish Gov't.,* the Eastern District of Louisiana found that the Louisiana Supreme Court would recognize the existence of a privilege between counsel for a corporation and a former employee of the corporation.[67] Specifically, the privilege exists where:

> (1) the former employee was employed by the corporation during the time relevant to the attorney's current representation of the corporation, (2) the former employee possesses knowledge relevant to the attorney's current representation of the corporation, and (3) the purpose of the communication is to assist the attorney in (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.[68]

The *Hanover* court noted that only a small number of federal courts have been faced with deciding whether to extend *Upjohn* to former employees.[69] The court discovered that both the Fourth and Ninth Circuits adopted the *Upjohn* concurrence, and that nearly all federal courts, with the exception of one district court, have held that the *Upjohn* privilege extends to former employees in certain circumstances.[70]

Likewise, the court in *Peralta v. Cendent Corp.* found that the line between privileged and non-privileged communications is based upon the ex-employee's conduct and knowledge regarding the matter being investigated.[71] Courts that protect privileged communications with former employees view the mutual duty between the employer-employee as a relevant but not a conclusive consideration.[72] Pro-privilege courts focus on the former employee's conduct and knowledge while he or she was still employed.[73] Therefore, if the attorney asserts the communication is privileged, the attorney must assert that the privilege arises out of the former employees conduct and knowledge while previously employed.[74] *Peralta* created the standard in Connecticut when determining whether communication between counsel for a corporation and a former employee is protected under the attorney-client privilege.[75] Both the standard in *Peralta* and *Hanover* adopt Justice Burger's

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information beyond the underlying facts of this case that Surles might unearth by questioning Weisser about his conversations with Air France's counsel would likely expose defense counsel's thought processes which are entitled to protection under the work product doctrine.").

67. Hanover Ins. Co. v. Plaquemines Par. Gov't, 304 F.R.D. 494 (2015).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Peralta*, 190 F.R.D. at 41.

72. *Id.*

73. *Id.*

74. Becker, *supra* note 55 at 240.

75. *Id.*

concurrence to determine whether privilege exists between former employees and the client-corporations.

The adoption of the *Upjohn* concurrence was not, however, universal prior to *Newman*. For example, in *Clark Equip. Co. v. Lift Parts Mfg. Co.*, the United States District Court for the Northern District of Illinois held that *Upjohn* does not include post-employment communications with former employees of a corporation.[76] There, defendant-corporation withheld information provided by a former employee of its corporation during discovery.[77] Defendant-corporation objected to discovery requests on the basis of attorney-client privilege.[78] In *Clark*, the Northern District Court followed *Wigmore's* eight point formulation in defining what attorney-client privilege entails.[79] The *Clark* Court revealed that post-employment communications with former employees are not protected communications.[80] The district court determined that former employees (1) have no interest in the outcome of the litigation, (2) willingness to provide information is unrelated to direction from corporate superiors, and (3) have no duty to their former employer.[81] The court noted that third parties can be freely interviewed by either party.[82] *Clark* held that former employees are indistinguishable from third parties because former employees no longer have a duty or agency-relationship with the former employer.[83]

III. ANALYSIS

When a corporation is notified of potential wrongdoing the corporation responds by initiating an internal investigation.[84] A corporate internal investigation allows the corporate entity to

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76. Clark Equip. Co., 1985 U.S. Dist. LEXIS 15457, at *14 (N.D. Ill. Sept. 30, 1985).

77. *Id.* at *8-11.

78. *Id.*

79. *Id.* at *12-13.

80. *See also id.* at *12-14 (stating:

> "Former employees are not the client. They share no identity of interest in the outcome of the litigation. Their willingness to provide information is unrelated to the directions of their former corporate superiors, and they have no duty to their former employer to provide such information. 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").

81. *Id.* at *14.

82. *Id.*

83. *Id.*

84. *See* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constitutes*, 54 B.C. L. REV. 73 (2013).

discover misconduct within the corporation.[85] "Corporations are notified of possible wrongdoing through various sources, including internal whistleblowers, external *qui tam* actions,[86] routine internal compliance measures implemented in response to sentencing incentives, and judicial acknowledgments that corporate compliance is a necessary component of corporate governance."[87] Internal investigations can also include criminal action against a corporation.[88] In this context, the legislature incentivizes the corporation's compliance.[89] Essentially, the government promotes investigations to uncover misconduct and information recovered which may survive a motion to compel on the theory of attorney-client privilege.[90]

Internal investigations allow the corporation to improve policy and ensure the company is in compliance with the corporation's policy and regulatory schemes.[91] The investigations encourage corporations to explore allegations while the company maintains its reputation.[92] Theoretically, corporate-counsel facilitates

85. *Id.* at 73-74; *See also* MARK P. GOODMAN & DANIEL J. FETTERMAN, CONDUCTING INTERNAL INVESTIGATIONS, IN DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS 87, 91 (Daniel J. Fetterman & Mark P. Goodman eds., 2011) (discussing management obligation to investigation alleged wrongdoing to minimize the company's risk).

86. *See, e.g.* United States ex rel Eisenstein v. City of New York, 129 S.Ct. 2230 (2009) (illustrating that in a *qui tam* action, a private party called a relator brings an action on the government's behalf. The government, not the relator, is considered the real plaintiff. If the government succeeds, the relator receives a share of the award. Also called a popular action).

87. Green & Podgor, *supra* note 84, at 90.

88. *Id.*

89. *Id.* at 89. There are many incentives for corporations to conduct internal investigations. For example, corporations may now need to move more swiftly as new legislation--such as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the Sarbanes-Oxley Act of 2002--places added requirements on corporations to timely report misconduct. Other recent statutes similarly require corporations to report misconduct, and an internal investigation may be necessary to assess whether the reporting is mandatory. Leniency programs also can incentivize a corporation to investigate misconduct and self-report.

90. *See* Fava, *supra* note 15, at 3 (quoting that "During the course of an internal investigation, the client may decide to disclose certain investigative findings to government or regulatory authorities. In certain contexts, such disclosures would be made to the U.S. Department of Justice and/or U.S. Securities and Exchange Commission. The deliberate and voluntary disclosure of privileged information or documents to government authorities can result in the waiver of attorney-client privilege and work-product protection, which can subject the information or documents to potential discovery in other litigation, including related or parallel civil actions. However, in the event that the government compels the production of information or documents through the use of a subpoena, the disclosure could be construed as 'involuntary' and the disclosure would, in certain circumstances, waive privilege only with respect to the government and not as to any other party").

91. Green and Podger, *supra* note 84, at 73.

92. *Id.*

appropriate action and properly advises corporate-clients when a robust investigation is necessary.[93] However, the judicial and legislative branch demonstrate concern that internal investigations allow corporations to abuse in-house oversight under the blanket of attorney-client privilege.[94] Corporate-counsel led internal investigations may result in potential abuses by withholding relevant information under the thin veil of attorney-client privilege.[95] The corporation's ability to characterize communications with former employees as privileged can frustrate the fact-finding process.[96] Specifically, corporate-counsel may discover less than favorable information from an agent of the corporation and withhold that information during pre-trial discovery.[97] Corporate-counsel disclosure of relevant information in legal proceedings promotes public policy.[98] Corporate attorney-client privilege applies where such privilege is essential to facilitate communications with corporate counsel.[99] Corporations may compel employees to disclose relevant information to aid corporate-counsel and threaten termination if employees withhold such information.[100] If an employee discloses information of misconduct, that information belongs to the corporation.[101] As a result, the corporation may distance itself from the alleged wrongdoer in order to avoid liability.[102]

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93. *Hickman v. Taylor*, 329 U.S. 495 (1947).

94. *See* Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 425 n.45 (2007) (highlighting that even when prosecutors are involved after internal investigation, agreements are not overseen by the court).

95. *See* Susan J. Becker, *Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and constraints*, 51 MD. L. REV. 239, 246 (1992) (asserting that the potential for abuse of this vital discovery tool demands court intervention and monitoring. Of foremost concern is the possibility that counsel will, either through subtle suggestions or unabashed indoctrination, manipulate the former employee's recollection of key events).

96. *Id.* (quoting that the initial contact may so intimidate the ex-employee that she will refuse to participate in the factfinding process absent a court order, and even if so ordered, will not be entirely forthcoming regarding the information she possesses).

97. Weissman & Newman *supra* note 94 at 425 n.45; *see* Pappas v. Holloway, 114 Wn.2d 198, 203-04 (1990) (citing Dike v. Dike, 75, Wn.2d 1, 11 (1968) (reasoning that because privilege sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of facts, the privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists).

98. Green & Podgor, *supra* note 85, at 73-126.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

A. Newman's Bright-Line Aims to Prevent Corporations from Withholding Discoverable Facts

The *Newman* holding emphasizes the minority view and federal courts' refusal to extend the corporate attorney-client privilege to post-employment communications between corporate-counsel and former employees.[103] The *Newman* Court begins its analysis by recognizing that our open civil judicial system allows parties to obtain discovery regarding any unprivileged matter that is relevant.[104] However, privileged information is shielded from discovery.[105] Attorney-client privilege recognizes that full and frank communications between attorneys and clients serves public ends in which counsel can only provide adequate legal advice where such communication occurs.[106] The *Newman* majority relies primarily on the agency relationship to create a bright-line rule that privilege does not extend to communications with former employees.[107] In Washington state, not all conversations with attorneys are automatically privileged.[108] While necessary to obtain the fullest disclosure of facts, the danger of including all communication may "result in the exclusion of evidence which is otherwise relevant and material."[109] The *Newman* Court found that Highland School District, like any organization, can only act through its constituents and agents.[110] "But everything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship."[111] Without the employee-employer agency relationship, the *Newman* majority argues that the former employee no longer owes duties of loyalty, obedience, or confidentiality to the corporation.[112] Without those duties, a former employee is indistinguishable from a third-party to a lawsuit who may be freely interviewed by either party to the lawsuit.[113]

The *Newman* majority did not extend privilege to post-employment communications.[114] The *Newman* majority

103. *Newman*, 281 P.3d at 1191.
104. *Id.*
105. *Id.*
106. *See id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Black's Law Dictionary* (9th ed. 2009)
111. *Id.*
112. *Newman*, 281 P.3d at 1191.
113. *Id.*; *see also Infosystems, Inc.*, 197 F.R.D. at 305 (asserting that "[i]t 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 U.S. Dist. LEXIS 15457 at *14).
114. *Newman*, 281 P.3d at 1191.

undervalued the importance of the former employed employee's conduct by focusing on when the agency relationship terminates.[115] The *Newman* court reasoned that the importance of allowing either party to uncover material facts in discovery outweighs extending the privilege to former employees.[116] In contrast, Highland argued that privilege should extend to communications with its former coaches because their conduct, while employed, may expose the corporation to vicarious liability.[117] While those concerns are valid, the *Newman* majority holds "they do not justify expanding the attorney-client privilege beyond its purpose."[118] According to the Court, that underlying purpose is to foster full and frank communications between counsel and the client-corporation not former employees.[119] The *Newman* majority asserts that focusing on the employer-employee agency relationship preserves a predictable legal framework where privilege may be readily recognized.[120] The *Newman* majority was unable "to find any principled line of demarcation" where communication between the former employee and corporate-counsel exist "beyond the end of the employment relationship."[121] The *Newman* majority was unconvinced that the corporation's need to know the former employees' knowledge provides a justification to extend privilege to communications to the same.[122] The *Newman* ruling is consistent with the holding in *Clark* because the court found that former employees have no identity of interest in the outcome of litigation.[123]

B. Are Former Employees and Third-Parties Indistinguishable for Purposes of Attorney-Client Privilege?

The *Upjohn* Court rejected the control-group test, in-part, because the relationship requirement restriction created a bright-line rule between corporate executives and lower-level employees who withhold the relevant information. The *Upjohn* privilege, however, does require some relationship between the information-provider and corporate-counsel.[124] *Newman*, along with a small

115. *Id.*

116. *See Hickman*, 329 U.S. at 500 (quoting that the purpose of the pre-trial discovery mechanisms established by the Federal Rules of Civil Procedure is "for the parties to obtain the fullest possible knowledge of the issues and facts before trial").

117. *See Newman*, 281 P.3d at 1193.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Clark Equip. Co.*, 1985 U.S. Dist. LEXIS 15457, at *14.

124. John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege.*, 57 N.Y.U. L. REV. 443, 497 (1982).

minority of federal courts, holds that the employer-employee relationship ends when employment is terminated.[125] The *Newman* Court's rationale mirrored that made by the District Court of Illinois in *Clark*.[126] As explained above, *Clark* reasoned that former employees are analogous to third-parties because they have no interest in the outcome of the litigation.[127] Former employees have no interest in the litigation because they no longer owe a duty to the corporation.[128] In *Clark*, the Court suggested former employees are virtually indistinguishable from a third-party who may have relevant information.[129] The court further opined that post-employment communications with former employees do not receive the shield of privilege simply because the former employees have knowledge of pertinent facts.[130] As such, the court suggested that because the attorney-client privilege encourages frank and full communication between the client and counsel, that privilege only extends to communications between corporate-counsel and the client-corporation.[131] The former employee - much like an employee or a third party - is not the client and therefore not represented by corporate-counsel.[132] Thus, former employees are functionally parallel to third-parties and those "post-employment communications … are not within the scope of the attorney-client privilege."[133]

The functional approach established in *Upjohn*,[134] taken literally, "would bar application of the privilege to communications with the attorney by former employees of a corporation" regardless if they were "directly involved in matters under investigation."[135] *Newman's* agency requirement invariably prevents corporate-counsel from engaging in confidential discussions with a former employee even though the former employee's knowledge existed while that agency relationship was intact.[136] In other words,

125. *Newman*, 281 P.3d at 1191.

126. *Id.*

127. *Clark Equip. Co.*, 1985 U.S. Dist. LEXIS 15457, at *14.

128. *Newman*, 281 P.3d at 1191.

129. *See Clark Equip. Co.*, 1985 U.S. Dist. LEXIS 15457, at *14 (quoting "[t]he reasoning of Upjohn does not support extension of the attorney-client privilege to cover post-employment communications with former employees of a corporate party. Former employees are not the client. They share no identity of interest in the outcome of the litigation. Their willingness to provide information is unrelated to the directions of their former corporate superiors, and they have no duty to their former employer to provide such information").

130. *Id.*

131. *Id.* at *13.

132. *Id.* at *14.

133. *Id.*

134. *Upjohn*, 449 U.S. at 402 (Burger, W., concurring). Upjohn required that under the functional analysis, the communication with the attorney must be authorized by a superior.

135. Sexton, supra note 124, at 499.

136. *Id.*

Newman holds that the timing of the employer-employee relationship is the distinction between whether post-employment communications are protected.[137] But, a "formalistic distinction based solely on the timing of the interview" frustrates the goal in *Upjohn*.[138] Although *Upjohn* specifically limited the scope of privilege to current employees, the attorney-client privilege requires certainty that "conversation between the attorney and client will remain privileged after the employee leaves."[139] *Upjohn's* holding ensures that corporate-counsel's communication with any person involved in the activity which might embroil the corporation in liability is protected.[140]

C. Newman's Chilling Effect on the Upjohn Privilege

Limiting the application of *Upjohn* to circumstances where a witness is a current employee that owes a duty to the client-corporation ultimately frustrates the underlying basis for the attorney-client privilege and the rationale of *Upjohn*.[141] How can the same considerations be privileged on the day the witness is employed, but not be privileged on the very next day when the witness is an ex-employee? *Newman* may deter an attorney from interviewing a witness for fear that the facts and circumstances of the interview will not be privileged.[142] In sum, the *Newman* court fails to provide a convincing rationale in response to the argument that the underlying facts are not protected, only the work product of the attorney.[143] Courts have held that corporate-counsel communication with a former employee may be deemed privileged where elements of the attorney-client privilege are satisfied.[144] *Newman* essentially adopts a bright-line rule with no purpose or rationale.[145] The protection afforded by the attorney-client privilege

137. Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1197 (Wash. 2016).

138. Sexton, *supra* note 124, at 499.

139. *Id.*

140. *Id.* at 500.

141. *See Hanover Ins. Co.*, 30 F.R.D. at 498-99 (citing that "it is clear to this Court that some privilege exists between counsel for a corporation and former employees of the corporation").

142. *Newman*, 381 P.3d at 1194.

143. *Id*. at 1199.

144. Valassis v. Samelson, 143 F.R.D. 118 (E.D. Mich. 1992); In re Coord. Pre-Trial Proceedings in Petrol. Prods. Antitrust Litig., 658 F.2d at 1361 n.7, *cert. denied sub nom*; *California v. Standard Oil Co.*, 455 U.S. 990 (1982); *Porter v. Arco Metals Co., Div. of Atl. Richfield Corp.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986).

145. *See Newman*, 281 P.3d at 1199 (quoting that the majority implies that extending the privilege to former employees would lack predictability and would frustrate the truth-seeking mission of the legal process. While these concerns are not insignificant, I do not believe they justify the majority's harsh, bright-line rule).

does not suppress the discovery of facts but instead shields the attorneys' memoranda and mental processes.[146] In due course, allowing opposing counsel to gain access to the memoranda reveals the work product, strategy and advice of counsel for the corporation, while not affecting the facts known by the witness or the disclosure of those facts later.[147]

The dissenting opinion in *Newman* expressly rejects the bright-line rule established by the majority and discusses the reasons why the majority's bright-line test will adversely impact attorney directed investigations.[148] The dissent argues that *Upjohn's* flexible analysis extends to "post-employment communications consisting of a factual inquiry into the former employee's conduct and knowledge" while employed, "made in furtherance of the corporations legal services" and enjoys privileged protection.[149] The dissent explains that the factual inquiry is paramount to allow "full and frank" fact-finding, which is the underlying purpose of the attorney-client privilege, in conducting a robust internal investigation.[150]

Former employees, just like current employees, may possess relevant information needed by corporate counsel to perform a robust investigation and to provide competent legal advice to the client.[151] Such crucial information does not lose relevance, nor should it lose privilege, simply because employment has ended.[152] The application of the attorney-client privilege should not disappear based solely on when counsel conducted the interview, nor on the current employment status of the witness.[153] The *Newman* dissent asserts that the underlying basis for privilege would be muddled if the timing of the interview became the distinguishing factor for whether communications are afforded protection.[154]

Most courts agree that communications with former employees regarding the scope of their employment are privileged.[155] In

146. WEBB, TARUN & MOLO, *supra* note 2, at 6-18.

147. *See Newman*, 381 P.3d at 1201 *(*quoting that to the extent communication between the former coaches and Highland's attorneys concerns a factual inquiry into the former coaches' conduct and knowledge during his or her employment, any such communications are privileged, and Highland need not answer questions regarding these communications. Post-employment communications between the former employer's counsel and a former employee that constitute a relevant factual inquiry into their conduct and knowledge during employment would be privileged, consistent with *Upjohn*).

148. *Id.* at 1194.

149. *Id.* at 1195.

150. *Id.*

151. *Id.* (quoting *In re Coord. Pretrial Proceedings in Petrol Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981)).

152. *Newman*, 381 P.3d at 1197.

153. *Id*. (quoting Sexton, *supra* note 124).

154. *Id*.

155. Fava, *supra* note 15, at 3; *see, e.g.,* U*nited States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C.,* 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004) (stating

Peralta, the Court recognized that privileged communications between an employee and corporate counsel do not automatically lose protected status upon termination of the agency relationship.[156] There, plaintiff-corporation asserted attorney-client privilege and withheld communications from a former employee.[157] The *Peralta* majority held that the line between "non-privileged communications with former employees should not be difficult to apply if the essential point is kept in mind: did the communication relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment?"[158] Therefore, if the communication is within the scope of the former employees conduct while employed, then those communications are shielded by attorney-client privilege.[159] The *Peralta* majority determined that conduct rather than agency is the line for whether communications are privileged.[160] *Peralta* follows the majority approach when determining whether privilege extends to former employees because it focuses on the conduct and information of the former employee stemming from their actual employment with a corporation where that knowledge embroils corporate liability.[161]

IV. PROPOSAL

This section proposes solutions to safeguard against potential attorney-client conflicts with former employees. First, it will discuss how *Newman* dangerously and unnecessarily narrows the corporate attorney-client privilege for the unwary practitioner and this section will solve the problem that *Newman* presents. Then, this section will address how the solution requires that the practitioner understand the underlying fundamental decision in *Upjohn* in order to reject the control-group test because it was too restrictive on the attorney-client privilege.

A. Why Newman Matters

Newman needlessly restricts the corporate attorney-client privilege for the diligent practitioner. But, does the ruling matter?

"the line to be drawn is not difficult: if the communication sought to be elicited relates to Ms. Elliot's conduct or knowledge during her employment with Medco Defendants, or if it concerns conversations with corporate counsel that occurred during her employment, the communication is privileged; if not, attorney-client privilege does not apply").

156. *Infosystems, Inc.*, 197 F.R.D. at 305.

157. *Id.*

158. *Peralta*, 190 F.R.D. at 41.

159. *Id.*

160. *Id.*

161. *Id.*

Clearly in the State of Washington an attorney must be aware of *Newman*. Likewise, the cautious practitioner must perform a conflicts of law analysis to determine if Washington law applies.[162]

It is unlikely, however, that *Newman* will gain traction outside of Washington State. Most federal courts have interpreted *Upjohn* to include former employees.[163] The Fourth and Ninth Circuits have unequivocally accepted the principle that *Upjohn* extends to protect communications between a corporate-attorney and a former employee of a corporation.[164] Similarly, the case law discussed above demonstrates the overwhelming inclination of Federal Courts to extend the attorney-client privilege to include interviews with former employees pursuant to the Burger concurrence.[165] *Clark* and *Newman* nonetheless present a troubling minority position.

Even if *Upjohn* protections and attorney-client privilege exists, counsel is unlikely to share her work-product or privileged information with the witness.[166] The attorney is hired to give advice to the client, not witnesses.[167] Attorneys are very capable of

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162. FED. R. EVID. 501. State common law will almost always apply to any claim of privilege.

163. *See* Mathias v. Jacobs, 197 F.R.D. 29 (S.D.N.Y. 2000) (holding that privilege applied to former employees); *Infosystems, Inc.*, 197 F.R.D. 303 (affirming that there may be situations where the former employee retains a present connection or agency relationship with the client corporation, or where the present-day communication concerns a confidential matter that was uniquely within the knowledge of the former employee when he worked for the client corporation, such that counsel's communications with this former employee must be cloaked with the privilege in order for meaningful fact-gathering to occur; *In re Coord. Pretrial Proceedings in Petrol. Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (same); *Peralta*, 190 F.R.D. at 40 (finding communications between former employee and corporate counsel privileged).

164. *See Peralta*, 190 F.R.D. at 41 n.1 (stating "[a]ccording to the Restatement (Third) of the Law Governing Lawyers [§ 73 cmt. e], the attorney-client privilege would not normally attach to communications between former employees and counsel for the former employer" in the absence of "a continuing duty to the corporation" based on agency principles); *Infosystems, Inc.*, 197 F.R.D. 303 (recognizing "there may be situations where the former employee retains a present connection or agency relationship with the client corporation" that would justify application of the privilege).

165. *See Peralta*, 190 F.R.D. at 40 (finding communications between former employee and corporate counsel privileged); *Mathias*, 197 F.R.D. 29; *Infosystems, Inc.*, 197 F.R.D. 303; *In re Coord. Pretrial Proceedings in Petrol. Prods. Antitrust Litig.*, 658 F.2d 1361 n.7.

166. *See* Fava, *supra* note 15, at 3 (discussing that in the event counsel conducts a risk assessment and finds evidence of impropriety, counsel can take immediate steps to ensure that misconduct is investigated in a way that allows for the protections of the attorney-client privilege).

167. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2013) (quoting "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)").

understanding and following the law.[168] Under a jurisdiction that applies the *Newman* analysis, the former employee will be treated like any other third-party witness and the attorney should take all reasonable steps to protect privilege, confidentiality and work product materials.[169]

Newman does compel the attorney to promptly and diligently investigate as soon as possible while the witnesses are still employed.[170] Promptly interviewing witnesses while they are still employed can mitigate the impact of *Newman*.[171] It is vital to interview relevant witnesses and employees immediately to protect against a fading memory and potential for lost documents. Attorneys should avoid becoming a victim of the *Newman* majority simply for not immediately commencing an investigation.

The essential point of *Newman* is clear. Attorneys must know prior to the interview whether the privilege applies and act accordingly. *Newman* merely transfers the witness from privileged status to the run of the mill third-party witness where no privilege applies. Attorneys acting accordingly and any application of *Newman* can be appropriately mitigated. However, the bottom line of *Newman* fails to address the policy implications of withholding privileges between counsel and a former employee. Specifically, the privilege in the corporate setting encourages both former and current employees to reveal information that, absent privilege, they would not reveal.[172]

B. The Practitioner Should Conduct Her Analysis Pursuant to the Burger Concurrence in Upjohn

The *Upjohn* Court "assumed that application of the privilege induces significant additional communications."[173] That assumption paired with the underlying framework, that former employees could embroil corporations, justifies extending the privilege to former employees. Chief Justice Burger's concurrence

168. *See* MODEL RULES OF PROF'L CONDUCT r.1.1 (AM. BAR ASS'N 2013) (quoting that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

169. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2013) (quoting that "[a] lawyer shall act with reasonable diligence and promptness in representing a client); *See also* MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2013) (quoting that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

170. *See Newman*, 381 P.3d at 1197 (discussing how the Newman majority emphasizes timing of the interview versus the purpose of attorney-client privilege established in Upjohn).

171. *Id.*

172. Sexton, s*upra* note 124, at 467.

173. *Id.*

in *Upjohn* created a three-factor test to establish whether post-employment communication with a former employee is privileged.[174] The communication may be privileged if (1) the former employee's conduct has bound or would bind the corporation; (2) there are legal consequences arising from the former employee's conduct; or (3) counsel forms appropriate legal responses to actions that have been or may be taken by others regarding that conduct.[175]

In *Newman*, Highland's counsel argued that its communications with the former coaches should be shielded by attorney-client privilege because the conduct of the former coaches while employed embroiled the school district in litigation. The important distinction that *Newman* and courts alike failed to consider was that underlying facts are inherently discoverable. While a witness cannot be compelled to answer what was said in confidence to her corporate-counsel, the witness may not refuse to disclose relevant facts simply because she communicated those facts to a corporate-counsel.[176] The *Newman* majority did not want corporations to have the ability to shield potentially harmful information under the veil of attorney-client privilege.

> A corporation can structure even its routine transactions so that information is not rendered in any discoverable form until it is transmitted to the corporation's attorney. In this way, the information can be given the character of a privileged communication by funneling it through the corporate counsel's office. Of course, if one assumes, as the Upjohn Court did, that most corporate actors voluntarily comply with the law, the possibility of using the privilege to circumvent the rules of discovery is not alarming. To the extent that some corporate actors are willing to employ this "funneling" tactic to shield otherwise discoverable information, however, there is cause for concern.[177]

The Burger concurrence balances the importance of privileged communications with the tools of discovery.[178] Privileged post-employment communications ensure client-corporations receive complete advice from corporate-counsel. While discovery may be frustrated, "discovery was hardly intended to enable a learned profession to perform its functions … on wits borrowed from the adversary."[179] The bright-line rule established in *Newman* rewards lazy practitioners and punishes corporate-counsel for conducting a robust investigation - hardly the goal purported in *Upjohn*.

The minority position on whether post-employment

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174. *Upjohn Co.*, 449 U.S. at 402 (Burger, W., concurring).
175. *Id.*
176. Sexton, s*upra* note 124, at 477-78.
177. *Id.*
178. *Upjohn Co.*, 449 U.S. at 402 (Burger, W., concurring).
179. *Id.* (quoting *Hickman v. Taylor*, 329 U.S. at 516).

communications are privileged focuses on the agency relationship. When employment ends, so does any possibility of privilege. To overcome the minority position, corporate-counsel should perform exit-interviews before employees end their employment. Essentially, if an interview is done while the agency relationship still exists, then that communication is privileged. Realistically, Highland School District knew or should have known that a student sustaining a debilitating brain injury while playing for its football team would become litigious. Highland's counsel should have foreseen the possibility of litigation and conducted an interview of the relevant actors while the agency relationship existed. If Highland's counsel did so, then the Washington Supreme Court may have recognized that communication as privileged. The organized practitioner recognizes that courts value the agency relationship and in order to satisfy the minority position, exit interviews should always be conducted in order to protect the corporation.

V. CONCLUSION

The importance of the attorney-client privilege outweighs the potential concerns for its abuse. The Supreme Court in *Upjohn* adopted the unanimous position that reducing the attorney-client privilege in the corporate setting damaged the ability of corporate-counsel to adequately advise the client-corporation. *Newman* and cases alike threaten the ability of corporate-counsel to adequately advise the corporate-client because former employees may have access to necessary privileged information needed for corporate counsel to sufficiently direct the course of litigation. The result of *Newman* frustrates the purpose of the attorney-client privilege and demonstrates a troubling minority that aims to make the corporate attorney-client privilege porous.