

NEW JERSEY LAWYER

the Magazine

R E P R I N T

Application of the Attorney - Client Privilege to Communications With Former Employees

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Attorneys frequently communicate with former employees of corporate clients to gather facts to prosecute or defend litigation. Are these communications protected by the attorney-client privilege? This article examines both the policy behind the attorney-client privilege and the case law addressing the issue. It also proposes that such communications are entitled to the protection of the attorney-client privilege.

There does not appear to be any New Jersey case law discussing the application of the attorney-client privilege to former employees. There is, however, case law addressing the issue in other jurisdictions. This case law supports the proposition that communications with former employees are protected by the attorney-client privilege.

The Policy Behind the Attorney-Client Privilege

First, the policy behind the attorney-client privilege in a corporate context must be examined. In *Upjohn Company v. United States*,¹ the U.S. Supreme Court stated that the purpose of the attorney-client privilege:

is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. ... "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." ... [T]he purpose of the privilege [is] to ... encourage clients to make full disclosure to their attorneys.²

In *Upjohn*, the Supreme Court considered whether the attorney-client privilege should be limited to senior management, since they make the decisions on behalf of the corporation based upon the attorney's advice (*i.e.*, the "control group"), or whether the privilege should be extended to middle- and lower-level employees. The Court opted to extend the privilege to all employees, finding that the control group test "overlooks the fact that the privilege exists to protect not only the beginning of professional advice to those who can

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act on it but also the giving of information to the lawyer to enable him to be of sound and informed advice.”³

The Court explained that employees beyond the “control group” often possess information needed by the corporation’s attorneys:

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.⁴

Thus, the attorney-client privilege applies to communications between attorneys and all employees of corporations. The United States Supreme Court’s rationale and the policy behind the attorney-client privilege have been recognized by the state courts in New Jersey.⁵

The Application of the Privilege to Former Employees

The majority of the Supreme Court did not reach the issue of whether communications with former employees were also protected from disclosure by the attorney-client privilege.⁶ However, in his concurring opinion, Chief Justice Burger advocated a general rule that would cover communications by both current and former employees.

[A] communication is privileged at least when, as here, 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 attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions:

(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.⁷

Other federal courts have ruled or commented on whether the attorney-client privilege extends to former employees. *In Matter of Coordinated Pre-trial Proceedings, etc.*,⁸ the Ninth Circuit noted that although *Upjohn* was specifically limited to current employees, the same rationale applies to former employees.

Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties. Again, the attorney-client privilege is served by the certainty that conversations between the attorney and client remain privileged after the employee leaves.⁹

In *Command Transportation v. Y.S. Line (USA)*,¹⁰ corporate counsel met with a former employee (Estis) to discuss the pending lawsuit. When the former employee was deposed, corporate counsel objected to questions about their meeting on the grounds that the discussion was protected by the attorney-client privilege.¹¹

The court noted that the attorney-client privilege protects an employee’s providing information to an attorney to allow the attorney to provide sound and informed advice to the corporation.¹² The court therefore held that the communications were protected from disclosure under the attorney-client privilege. In this regard, the court found that:

Applying the attorney-client privilege to the communications at issue in the instant case would foster the flow of information

to corporate counsel regarding issues about which Y.S. was specifically seeking legal advice. The communications concerned actions taken by former employee Estis herself about which she is the most knowledgeable person.¹³

In Re Allen,¹⁴ the Fourth Circuit addressed the application of the attorney-client privilege to conversations with a former employee. The court noted that most lower courts have followed the reasoning in Chief Justice Burger’s concurring opinion in *Upjohn* and applied the privilege to communications with former employees.¹⁵

The Fourth Circuit also noted that some lower courts have denied the privilege to communications between counsel and former employees, but that these courts “have generally been following state law or concluded that the former employee had ceased being employed by the client *before* the relevant conduct occurred.”¹⁶ The court concluded that “the analysis applied by the Supreme Court in *Upjohn* to determine which employees fall within the scope of the privilege applies equally to former employees.”¹⁷

Conclusion

One of the policies behind the attorney-client privilege — an attorney’s obtaining information to render legal advice to the client — supports the proposition that the privilege extends to communications with former employees of a corporation. Accordingly, the attorney-client privilege should protect such communications.☪

Endnotes

1. 101 S. Ct. 677 (1981).
2. *Id.* at 682 (citations omitted).
3. *Id.* at 683 (citations omitted).
4. *Id.* at 683. *See also Amatuzio v. Gandalf Systems Corp.*, 932 F. Supp. 113, 117 (D.N.J. 1996) (*citing Upjohn*).

5. See, e.g., *United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 561 (App. Div. 1984).
6. See *Upjohn*, 101 S. Ct. at 685 n.3.
7. *Id.* at 689 (citations omitted; emphasis added).
8. 658 F. 2d 1355 (9th Cir. 1981).
9. *Id.* at 361 n.7 (citations omitted). See also *Admiral Insurance v. U.S. District Court for the District of Arizona*, 881 F. 2d 1486, 1493 (9th Cir. 1989) (noting its prior decision that “the *Upjohn* rationale necessarily extended the privilege to former corporate employees”).
10. 116 F.R.D. 94 (D. Mass. 1987).
11. *Id.* at 95.
12. *Id.* at 96 (citing *Upjohn*, 101 S. Ct. at 683).
13. *Id.* at 97. See also *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D. Mass. 1987) (“In some circumstances, the communications between a former employee and a corporate party’s counsel may be privileged.”).
14. 106 F. 3d 582 (4th Cir. 1997).
15. See *id.* at 605 (and cases cited therein).
16. *Id.* at 606 n.14 (citations omitted).

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