

The Attorney-Client Privilege and Its Application to Communications with Former Corporate Employees

By Michael J. Hutter

You are general counsel/lead outside counsel to X Corp., a large consumer products manufacturing firm with its principal place of business in Westchester County. The corporation's CEO has requested your advice regarding a developing matter. The CEO has been informed that in the past month there have been several reported product failures involving the corporation's most popular product in terms of dollar sales. The CEO wants you to lead an investigation to determine whether the product failures are isolated cases or whether there may be a flaw with respect to the design or manufacturing process of the product, creating a risk of legal liability and harm to the corporation's reputation, and upon its conclusion advise the corporation as to what action needs to be taken, if any.

The investigation plan you come up with will start with an interview of the widget's product manager during the time of the widget's development and initial marketing. However, it is disclosed to you that the product manager has recently retired but is available and willing to meet with you. You set up a meeting with the former employee, with the intent of having the former employee tell you everything known about the product's development and manufacturing processes, including concerns that may have surfaced about such processes, so that you can create and execute the best legal strategy to eliminate or at least minimize a potential corporate "crisis" in the event of a problem with the widget.

The immediate concern you have is, of course, whether the communications between the former employee and yourself are protected from disclosure by New York's attorney-client privilege, as codified in CPLR 4503(a)(1). In this regard, it is well settled in New York that corporations are entitled to invoke the privilege,¹ and that no distinction exists between in-house counsel and outside counsel as to the applicability of the privilege, provided the attorney is acting as the corporation's legal advisor.² Furthermore, New York law recognizes that communications made in the context of an internal investigation will generally be protected by the privilege, provided the investigation is being undertaken for the purpose of rendering legal advice even if the gathering of factual information is involved.³ However, New York law does not provide a ready answer as to whether the privilege will attach to communications between a former employee of the corporation and the attorney for the corporation that occur during the investigation. This article will address the issue and its ramifications.

Analysis starts by determining the scope of the privilege in the corporate context, namely, whether a corporation may assert the privilege whenever a present corporate employee, regardless of position or rank, communicated with the corporation's attorney for purposes of securing legal advice for the corporation. To answer the question, the vast majority of courts in the United States follow the lead of the Supreme Court's decision in *Upjohn Co. v. United States*.⁴

Upjohn rejected the then-prevalent "control group" standard which held the privilege only extended to communications involving corporate counsel from and to an employee who was in a position of control within the corporation.⁵ It held the privilege may extend to communications involving the attorney for the corporate client and low and mid-level employees of the corporation. While *Upjohn* did not enunciate a specific rule, most courts have interpreted *Upjohn*, based upon the circumstances it stressed, to require for the privilege to be applicable to such communications that they concerned matters within the scope of the employee's duties; employers were communicating at the direction of their corporate supervisors; communications were made for the purpose of providing a basis for legal advice to the corporation; and the communications were considered confidential when made.⁶ Notably, the privilege, when applicable, is the corporation's privilege and not the employee's privilege.⁷

While the New York State Court of Appeals has not addressed the *Upjohn* issue, the lower courts in New York have embraced *Upjohn* and its holdings.⁸ With this recognition of *Upjohn* in New York, there should be no doubt that in the circumstance posited, the communication between you and the project managers, if they occurred during employment, would be privileged. The question now is whether that privileged status continues when the communications occur post-employment.⁹

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This former employee issue involves two different types of communications: (1) communication made by the employee while employed; and (2) communication made by the employee after the employment had ended.¹⁰ They will be addressed separately.

As to pre-termination communications, state and federal courts in New York, as well as courts in other jurisdictions, uniformly hold that privileged communications which occur with corporate counsel during the course of an individual's employment remain privileged even after the employment relationship has been terminated.¹¹ As one commentator has stated: "Whatever communications are privileged communications during the course of the former employee's employment should clearly remain privileged. No reason exists to terminate privileges that have attached during the course of the employment along with the termination of the employment. Indeed, were that to be the case any former employee could terminate preexisting privileges at will."¹² Thus, any privileged information obtained by an employee while an employee of the corporation, including any information conveyed by corporate counsel, remains privileged upon termination of employment.

As to post-termination communications, it must first be noted that the courts in the United States disagree as to whether confidential communications between former employees and corporate counsel are privileged. The majority view is that the privilege is applicable to confidential communications between former employees of a corporation and corporate counsel, provided the *Upjohn* standard referred to above is complied with.¹³ In light of the purpose underlying the privilege, namely, to "[foster] the open dialogue between lawyer and client that is deemed essential to effective representation,"¹⁴ this holding is warranted. As observed by a commentator: "[A] formalistic distinction based solely on the timing of the interview [between corporate counsel and the knowledgeable employee] cannot make a difference if the goals of the privilege . . . are to be achieved"¹⁵

However, a number of courts have declined to extend the privilege to post-employment communications between a former employee and corporate counsel.¹⁶

The rationale of these courts used to support their holding is, as stated by the Washington Supreme Court in *Newman v. Highland School Dist.*, that "[E]verything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship. . . . Without an ongoing obligation between the former employee and employer that gives rise to a principal agent relationship, a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party."¹⁷

In essence, these courts take the position that the termination of the employment relationship precludes the application of the privilege to new communications. The

dissenters in the *Newman* decision aptly commented that the refusal to extend the privilege to former employees is "at odds with the functional analysis underlying the decision in *Upjohn* and ignores the important purposes and goals that the attorney-client privilege serves."¹⁸ In this regard, the dissenters persuasively argued that former employees "may possess relevant information pertaining to events occurring during their employment needed by corporate counsel to advise the client with respect to actual or potential difficulties. Relevant information obtained by an employee during his or her period of employment does not lose relevance simply because employment has ended."¹⁹ Thus, the dissenters would extend the privilege to confidential communications with former employees concerning matters that occurred during employment.

Federal courts in New York court uniformly follow the majority rule.²⁰ *Indergit v. Rite Aid Corp.* is illustrative.²¹ In this action brought by store managers of Rite Aid alleging violations of the federal Fair Labor Standards Act and the New York Labor Law regarding overtime pay, an issue arose as to the privileged status of communications between Rite Aid's counsel and former Rite Aid district managers who supervised several of the plaintiffs. The district court held that counsel's conversations with the former district managers concerning their conduct and duties while employed by Rite Aid would be within the privilege.²² The district court also noted that because the privilege is Rite Aid's and not the personal privilege of the former employees, none of these individuals had the ability to waive the privilege; only Rite Aid could waive the privilege.²³

The New York state courts have not fully addressed the issue of post-termination communications. At least one court has indicated post-termination communications would fall within the privilege.²⁴ Despite the dearth of state court precedent, it is reasonable to conclude that the state courts would follow the majority rule. In this connection, the underlying rationale of the majority view is consistent with New York policy underlying the attorney-client privilege, and there is nothing in state precedent which would indicate that the courts would adopt the minority view.

With this background, you should feel comfortable about a candid discussion with the former employee. But do not get too comfortable. The reason is the privilege only protects communications about the former employee's conduct while employed.²⁵ It does not protect any communications beyond the former employee's activities within the course of the employee's employment. Expressed differently, communications regarding matters and developments that occurred post-termination fall outside the privilege.

The decision in *Peralta v. Condent Corp.* illustrates this limitation.²⁶ In *Peralta*, plaintiff alleged claims of employment discrimination. Plaintiff's counsel sought to depose Klaber, plaintiff's former immediate supervisor and alleg-

edly the decision-maker with regards to plaintiff's claims. At the time of the deposition, Klaber was no longer employed by defendant. The district court, in applying the majority rule as to what matters Klaber could be examined on, held as follows:

To the extent that conversations between defendant's counsel and Klaber went beyond Klaber's knowledge of the circumstances of plaintiff's employment and termination, and beyond Klaber's other activities within the course of her employment with the defendant, such communications, if any, have not been shown to be entitled to defendant's attorney-client privilege. If, for example, [counsel] informed Klaber of facts developed during the litigation, such as testimony of other witnesses, of which Klaber would not have had prior or independent personal knowledge, such communications would not be privileged, particularly given their potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously.²⁷

The final matter to be addressed is whether there can be protection for discussions that fall outside the scope of the attorney-client privilege. In theory, CPLR 3101(d) (2) has potential application. This provision provides a qualified privilege for otherwise discoverable material prepared in advance of litigation.²⁸ Factual information obtained from interviews with a third party, such as a former employee, is potentially protected from disclosure by this provision.²⁹ However, to be immune from discovery, the party resisting discovery "must demonstrate that the material sought was prepared exclusively for litigation."³⁰ Thus, multipurpose reports are not within CPLR 3101(d) (2).³¹ With this limitation, you may have difficulty in establishing protection as it cannot be said at the outset that the investigation is being conducted solely and exclusively for litigation.³²

Turning now to your planned interview with the former program direction for X Corp.'s product, you can now have some comfort—indeed, a lot of comfort—as to whether your discussions will have to be disclosed in future litigation or proceedings. So long as you limit discussions to what the program director learned and was involved in while employed by X Corp., any confidential communications that pertain to legal matters will be privileged. To further assure the application of the privilege, you should also provide the *Upjohn* warning before discussions start.

Endnotes

1. *Rossi v. BlueCross and BlueShield of Greater New York*, 73 N.Y.2d 588, 591-592 (1989); Barker and Alexander, *Evidence in New York State and Federal Courts* (2d ed) § 5:8.
2. Barker and Alexander, *supra* n. 1 at § 5:8. See *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016). Communications that relate solely to non-legal personal or business matters fall outside the privilege. See *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377-378 (1991) ("The communication itself must be primarily or predominantly of a legal character").
3. See *Spectrum Sys.*, 78 NY2d at 378; *In re Woolworth Corp. Securities Class Action Litig.*, 1996WL 306576 (S.D.N.Y.).
4. 449 U.S. 383 (1981).
5. See *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F.Supp. 483, 485-486 (ED Pa. 1962).
6. See *State of New York v. Salazar*, 2011 WL 13205947 *3-4 (ND NY); Martin, Capra & Rossi, *New York Evidence Handbook* (2d ed) § 5.2.5.1; 3 *Weinstein's Federal Evidence* § 503.22.
7. *Id.*
8. See *Doe v. Poe*, 189 A.D.2d 132, 135 (2d Dep't 1993). In this regard, the corporate attorney when speaking with the employee should give the so-called "Upjohn warning." (See *United States v. Rueble*, 583 F.3d 600 (9th Cir. 2009); *Rules of Professional Conduct* (NY)1.13(a).
9. Although several of the employees involved in *Upjohn* had terminated their employment before their interviews with corporate counsel, the lower courts did not address that fact, and the Supreme Court "decline[d] to decide it without the benefit of treatment below." (*Upjohn*, 449 U.S. at 394, n. 3). In a concurring opinion, Chief Justice Burger was of the view that the privilege should apply 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." (*Upjohn*, 449 U.S. at 403).
10. See, generally, 1 Greenwald, Stauffer and Schrantz, *Testimonial Privileges* (Oct. 2017) § 1:42.
11. See *e.g.*, *Radovic v. City of New York*, 168 Misc.2d 58, 60-61 (Sup. Ct. N.Y. Co. 1996) ("The termination of the employment relationship did not dissolve the attorney-client privilege, which forever protects the client . . . from disclosure against its will of protected communications between a former employee and former employer."); *Salazar*, 2011 WL 1320597 at *4; see also *In re Coordinated Pretrial Proceedings, Etc.*, 658 F.2d 1355, 1361 n. 7 (9th Cir. 1981) ("[T]he privilege is served by the certainty that conversations between the attorney and the client will remain privileged after the employee leaves").
12. Epstein, 1 *The Attorney-Client Privilege* 223 (6th ed. 2017).
13. See, *e.g.*, *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997); *Admiral Ins. Co. v. U.S. Distr. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1492-93 (9th Cir. 1989); *Sories v. Air France*, 2001 WL 815522 at *6 (S.D.N.Y.). ("The vast majority of federal cases hold that communications between company counsel and former company employees are protected by the attorney-client privilege if they are focused on exploring what the former employee knows as a result of his prior employment about the circumstances giving rise to the lawsuit"); Spahn, *The Attorney-Client Privilege and The Work Product Doctrine* (3d ed.) § 6.1202 (collecting cases).
14. *Spectrum Sys.*, 78 N.Y.2d at 377; see also *Trammel v. United States*, 445 U.S. 40, 51 (1980) (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 session is to be carried out").
15. Sexton, *A Post- Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 NYU L. Rev. 443, 499 (1982).

16. See, e.g. *Newman v. Highland School Dist.*, 381 P.3d 1188, 1191-1194 (Wash. Sup. Ct. 2016); *United States v. Merck-Medco Managed care, LLC*, 340 F.Supp.2d 554, 557-558 (ED Pa. 2004); *Infosys., Inc. v. Cerridian Corp.*, 197 F.R.D. 3030, 306 (ED Mich. 2000).
17. 381 P.3d at 1192-1193.
18. *Id.* at 1195.
19. *Id.* at 11957.
20. See, e.g. *Subramanian v. Lupin, Inc.*, 2019 WL 1771556 at 2 (SD NY); *MF Global Holdings Ltd. v. Pricewaterhouse Coopers LLP*, 232 F.Supp.3d 558, 569 (S.D.N.Y. 2017); *Gioe v. AT&T Inc.*, 2010 WL 3780701 at 2 (S.D.N.Y.).
21. 2016 WL 6441566 (S.D.N.Y.).
22. *Id.* at *3.
23. *Id.*
24. *Radovic*, 168 Misc.2d at 60-61.
25. *GlobalrockNetworks, Inc. v. MCI Communications Servs.*, 2012 WL 13028650 at *4 (N.D.N.Y.) (collecting cases).
26. 190 F.R.D. 38 (D Conn. 1999).
27. *Id.* at 41.
28. 4 Haig, *Commercial Litigation in New York State Courts* (4th ed.) §.5:29.
29. See, e.g., *DeGourney v. Mulzac*, 287 A.D.2d 680 (2d Dep't 2001); see also *Subramanian*, 2019 WL 1771556 at *51; *Gioe*, 2010 WL 3780701 at 3. However, the notes and memoranda made in connection with an attorney's interview of a witness prepared in the course of litigation constitutes attorney's work product, which is absolutely exempt from discovery. See *Siemens Solar Industries v. Atlantic Richfield Co.*, 246 A.D.2d 476 (1st Dep't 1998).
30. *Carden v. Allstate Ins. Co.*, 105 A.D.2d 1048, 1049 (3d Dep't 2013).
31. See *Madison Mut. Ins. Co. v. Expert Chimney Servs., Inc.*, 103 A.D.3d 995, 996 (3d Dep't 2013).
32. See *Plimpton v. Massachusetts Mut. Life Ins. Co.*, 50 A.D.3d 532, 533 (1st Dep't 2008).

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