

VERMONT SUPERIOR COURT
Windham Unit
7 Court Street
Newfane VT 05345
802-365-7979
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 416-12-16 Wmcv

Mayotte et al vs. Brattleboro Memorial Hospital, et al.

Decision on Motion to Compel (Motion 37)

In October 2018, the plaintiffs filed a motion to compel on an emergency basis, seeking a court order during the deposition of witness Meredith Merritt, a certified nurse midwife who had been employed by the hospital during the plaintiff's pregnancy. During the deposition the plaintiffs' attorney asked Ms. Merritt, who was then no longer employed by Brattleboro Memorial Hospital (BMH), whether she had met with defendant's attorney before the deposition. She replied that she had done so. Plaintiffs' counsel then asked her to state what they had discussed. Defendants' counsel objected on the grounds of attorney-client privilege. Plaintiffs filed this motion to compel the witness to answer, arguing that the privilege did not apply. On October 1, 2018, Judge Gerety denied the requested expedited relief, and stated that he would await further filings and then issue the ruling on the motion. Both parties have submitted legal memoranda in support of their positions on this motion since that time.

The parties' chief dispute is whether the attorney-client privilege for an organization, in this case BMH, extends to former employees of that entity. Both parties agree that the seminal case of *Upjohn Co. v. United States*, 449 U.S. 383, 394-395 (1981), established that under federal law and court rules, an organization's attorney's communications with the current employees of the organization would presumptively be covered by attorney-client privilege. That case left open the question of whether the privilege would ever extend to former employees, because it had not been addressed by the court below. *Upjohn Co.*, 449 U.S. at 394 n.3.

The parties diverge on this question. The plaintiffs argue that the court should adopt the position taken by the Washington Supreme Court, that a corporate attorney's communications with former employees of the corporation should not be covered by the attorney-client privilege, no matter what the nature of those communications. *Newman v. Highland School District No. 203*, 381 P.3d 1188, 1192-93 (Wash. 2016). The Washington Court noted that "[t]he underlying purpose of the corporate attorney-client privilege is to foster full and frank communications between counsel and the client (i.e., the corporation), not its former employees," and that limiting the privilege to current employees would "preserve[] a predictable legal framework." *Newman*, 381 P.3d at 1193.

The defendants argue that the majority of courts that have considered this question have concluded that the privilege may extend to former employees of the entity, in limited circumstances, and that it should apply here. This position was adopted and explained in *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D.Conn. 1999). The court there held that in a case involving claims of a wrongful employment termination, the attorney for the corporate employer that was alleged to have engaged in the wrongful acts could engage in privileged communication with a former corporate employee who had been employed there at the time of the alleged wrongful conduct. The attorney's communications would be privileged only if they related to

the former employee's job duties while she was an employee, and her knowledge, acquired while she was the defendant's employee, of the circumstances related to the employment of the plaintiff and the termination of the plaintiff's employment. *Peralta*, 190 F.R.D. at 41. The corporation's pre-deposition communication with the former employee for the purpose of learning about her knowledge of those facts was privileged. *Id.* The court also noted that the attorney's communications to this former employee about the attorney's own conclusions and opinions of the case, if she made any, would likely be covered by the attorney work-product privilege. *Id.* at 42. This decision was based on the recognition, as stated in *Upjohn*, that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390.

Vermont's attorney-client privilege, V.R.E. 502(b), states:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer, or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

The Reporter's Notes from the 1995 amendment to the rule specifically refer to the *Upjohn* case with approval. Reporter's Notes—1995 Amendment, V.R.E. 502. That amendment was made at the same time that the legislature added a statute clarifying the lawyer-corporate client privilege as follows:

Communications otherwise privileged under Rule 502 of the Vermont Rules of Evidence are privileged with respect to a corporation only if the representative client is a member of the control group of the corporation, acting in his or her official capacity. However, if the communications are with a representative client who is not a member of the control group, such communications are privileged only to the extent necessary to effectuate legal representation of the corporation.

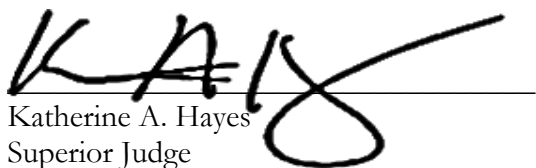
12 V.S.A. § 1613.

Our Supreme Court held that the privilege applied to protect an attorney's communication with the sole employee of the attorney's corporate client about that employee's knowledge of facts relevant to a wrongful death action brought against the corporate client, even though the Rule had not been amended, and the statute had not yet been adopted. *Baisley v. Misisquoi Century Association*, 167 Vt. 473, 486 (1998). The court held that the preexisting "control group test" was too narrow to effectively protect the attorney-client privilege in the corporate setting. *Baisley*, 167 Vt. at 485. Because the attorney's communications to the employee were necessary for the lawyer to represent the corporate defendant, they were privileged. *Id.* at 486.

The plaintiffs note that Vermont Rules of Professional Conduct 4.2 would have allowed them to communicate directly with Ms. Merritt and to interview her without notice to BMH's attorney. Comment 7 to the Rule states that: "Consent of the organization's lawyer is not required for communication with a former constituent." This is true, but it does not affect the attorney-client privilege for BMH's communications with Ms. Merritt.

Based on the above law, the court finds a corporate attorney may assert the client's privilege for his or her communications even with former employees of the entity, so long as those communications are focused on the events and facts that the former employee observed or learned during employment, and on the events and issues that are the focus of the representation. It is undisputed that this was the case as to BMH's counsel's communications with Ms. Merritt in preparation for her deposition.

Therefore, the court denies the motion to compel Ms. Merritt to answer the plaintiffs' deposition questions about her communications with BMH's attorney in preparation for her deposition.

A handwritten signature in black ink, appearing to read 'K.A.H.', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Katherine A. Hayes
Superior Judge
February 10, 2022