Updates
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Washington Supreme Court Extends Corporate Privilege to Non-Employee Contractors

Previous Scope of Corporate Attorney-Client Privilege

More than thirty years ago, the Washington Supreme Court ruled defense counsel may not engage in ex parte communications with a plaintiff's treating physician. *Loudon v. Mhyre*, 110 Wn.2d 675, 676 (1988). The *Loudon* rule, as it's known, was revisited and tempered slightly in *Youngs v. PeaceHealth*, when the court held defendant hospitals may have ex parte communications with employee-physicians who treated a plaintiff, as long as the communications "are limited to the facts of the alleged negligent event." 179 Wn.2d 645, 671 (2014).

Recently, the court was asked to consider expanding its holding in *Youngs* to allow ex parte communications between defendant hospitals and their *nonemployee* physicians. That is: Does corporate attorney-client privilege trump physician-patient privilege even when the treating doctor is an independent contractor? In a November ruling, the court held it does.

Patient Objects to Joint Representation of Hospital and Contractor, Alleging Violation of Physician-Patient Privilege

In 2015, staff at Tacoma General Hospital treated Doug Hermanson for a variety of injuries sustained during an automobile accident. Hermanson subsequently sued MultiCare Health System (the owner of Tacoma General Hospital), alleging violation of the physician-patient privilege and unauthorized disclosure of confidential health information. MultiCare retained counsel to jointly represent itself and Dr. Patterson, an independent contractor who treated Hermanson during his hospital stay.

Hermanson objected to this joint representation, arguing ex parte communications between MultiCare, its attorneys, and Dr. Patterson violated his physician-patient privilege. For its part, MultiCare sought to protect its communications with not only Dr. Patterson, but also a nurse and social worker who treated Hermanson during his hospital stay.

Court Rules Corporate Attorney-Client Privilege Extends to Contractors in Limited Circumstances

The court held MultiCare may have ex parte communications with Dr. Patterson despite his status as an independent contractor. At base, the court insists *Youngs*, which protected a defendant-hospital's communication with employee-doctors about the event(s) giving rise to a lawsuit, was not anchored in the doctors' status as employees, but rather in counsel's need to discern what happened. That same necessity controlled MultiCare's relationship with Dr. Patterson: "[r]egardless if Dr. Patterson is an independent contractor, both parties state that [he] treated Hermanson for the injuries at issue … and performs work on behalf of MultiCare. Dr. Patterson has the information to determine what happened to trigger the litigation."

The court laid out two additional reasons MultiCare should be allowed to communicate ex parte with Dr. Patterson: First, Dr. Patterson maintained a "principal-agent" relationship with MultiCare. Second, Dr. Patterson served as the "functional equivalent" of an employee. Again, this is so even though he is formally an independent contractor.

When determining whether a principal-agent relationship exists between two parties, "the most crucial factor is the right to control the details of the work." Because Dr. Patterson was expected to abide by MultiCare's policies and procedures, the court found MultiCare "controlled" his conduct such that a principal-agent relationship existed. This finding was buoyed by the fact Dr. Patterson owed "duties of loyalty, obedience, and confidentiality" to MultiCare.

Finally, the court applied a "functional equivalent" test from the U.S. Courts of Appeal for the Eighth and Ninth Circuits to further support its extension of attorney-client privilege to contractors like Dr. Patterson. The Eighth Circuit extended corporate attorney-client privilege to nonemployees "who possess a significant relationship to the client and the client's involvement in the transaction that is the subject of legal services." *In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994) (alterations omitted). The Ninth Circuit similarly found someone who communicated with outside organizations on behalf of the company, managed company employees, and was the primary agent in a company's communications with corporate counsel qualified as the "functional equivalent" of an employee. *U.S. v. Graf*, 610 F.3d 1148, 1159 (9th Cir. 2010).

Because Dr. Patterson performed similar work for MultiCare, he was deemed the "functional equivalent" of a MultiCare employee. This determination relies heavily on the fact Dr. Patterson maintained a "significant relationship" with MultiCare, performing work on behalf of the organization, in one of its hospitals, pursuant to its policies. In short, he "constantly perform[ed] work in a MultiCare facility that is consistently monitored by MultiCare."

In addition to Dr. Patterson, MultiCare sought to protect its communications with a nurse and social worker—both MultiCare employees—who treated Hermanson during his stay at Tacoma General. Relying on its ruling in *Youngs*, the court extended attorney-client privilege to the hospital's communications with its nurses and social workers. The court explained the privileges attaching to patients' interactions with these types of healthcare providers mimic the physician-patient privilege. Because the physician-patient privilege gives way to attorney-client privilege in these circumstances, so too do the nurse-patient and social worker-client privileges. Importantly, though, the attorney-client privilege only covers communications about the facts of the alleged negligent event. *Hermanson v. MultiCare Health System, Inc.*, 475 P.3d 484 (Wash. 2020).

Takeaways for Employers

While *Hermanson* deals specifically with the interaction between corporate attorney-client privilege and privileges that attach to a patient's interactions with healthcare providers, the case nonetheless bolsters the argument of employers across all industries that communications with independent contractors and other nonemployees fall within the corporate attorney-client privilege.

Though the privilege extends only to communications about the events at the heart of the lawsuit, the case still represents a significant expansion of attorney-client privilege in Washington state.

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