

# CLIENT ALERT

## Employment, Labor & Immigration

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### **Communications Between Pharmacy Benefit Manager's Counsel And Ex-Employee Subject To Limited Privilege**

Today's workforce is mobile. Whether because of retirement, preferable job opportunities, reductions in force or otherwise, attorneys seeking information in order to provide corporate clients with legal advice or to prepare for litigation must often interview both current and former employees. Are counsel's communications with former employees discoverable or privileged? That issue was addressed in a recent decision in the U.S. District Court for the Eastern District of Pennsylvania.

#### **The Lawsuit**

In *United States v. Merck-Medco Managed Care, LLC*, the court considered the applicability of the attorney-client privilege to corporate counsel's communications with former corporate employees. The decision arose out of a lawsuit by the United States and others (collectively, the "United States") under the False Claim Act and the Public Contracts Anti-Kickback Act.

The defendants were a pharmacy benefit manager and related entities and individuals (the "Medco Defendants"). Pharmacy benefit managers manage prescription drug benefits for health plans. In the lawsuit, the government alleged that the Medco Defendants had defrauded the federal government while managing prescription drug benefits for Blue Cross Blue Shield Association, which provided healthcare to federal employees. The government also alleged that the defendants had made and received payments for favorable treatment with other companies and health plans.

#### **The Discovery Dispute**

During discovery, government counsel took the deposition of a former employee of the Medco Defendants, Susan Elliott. At the deposition, Elliott testified that she did not

have an attorney and was not represented by counsel for the Medco Defendants. Counsel for the Medco Defendants confirmed that they did not represent her.

Nonetheless, during Elliott's deposition, counsel for the Medco Defendants asserted the attorney-client privilege and instructed Elliott not to answer questions regarding communications that she had had with the Medco Defendants in preparation for her deposition or during breaks in the deposition. Elliott followed these instructions and refused to answer such questions.

Arguing that aspects of Elliott's deposition testimony were inconsistent with her previous statements regarding activities that were material to the case, the government filed a motion to compel additional testimony from Elliott concerning four subjects:

1. Statements that the Medco Defendants' counsel made to Elliott regarding the nature of the case;
2. Statements that Elliott made to the Medco Defendants' counsel regarding her discussions with government investigators;
3. Descriptions and summaries of witness testimony that the Medco Defendants' counsel provided to Elliott; and
4. Discussions during Elliott's deposition between Elliott and the Medco Defendants' counsel.

The government argued that it should be permitted to question Elliott on these subjects because her discussions with the Medco Defendants' counsel may have influenced her testimony. The Medco Defendants opposed the motion on the ground that communications between Elliott and the Medco Defendants' counsel were protected from disclosure by the attorney-client privilege. According to the Medco Defendants, the privilege applied to

discussions between their counsel and former employees, just as the privilege applied to discussions between their counsel and current employees.

### The Court's Analysis

In deciding the motion, the court first considered the U.S. Supreme Court's decision in *Upjohn Co. v. United States*. In *Upjohn*, the Court held that discussions between corporate counsel and *current* employees are privileged when: (1) the discussions were with the corporate counsel, acting as such; (2) the discussions occurred at the direction of corporate supervisors in order to secure legal advice; (3) the discussions concerned matters within the scope of the employees' duties; and (4) the employees were aware that the purpose of the discussion was so that the corporation could obtain legal advice.

The *Merck-Medco* court noted that Chief Justice Berger, in his concurring opinion in *Upjohn*, had suggested that the attorney-client privilege should extend to communications between corporate counsel and *former* employees. The *Merck-Medco* court explained, however, that the majority in *Upjohn* did not address the question.

Because of the absence of binding precedent from the Supreme Court or the Third Circuit, the *Merck-Medco* court looked to other federal court decisions on the issue. First, the court considered *Infosystems, Inc. v. Ceridian Corp.*, in which a federal court in the Eastern District of Michigan held that the attorney-client privilege applies to former employees, but only for otherwise privileged communications with corporate counsel that occurred during their employment. The *Infosystems* court reasoned that communications between corporate counsel and a former employee are not privileged because the willingness of former employees to provide information is typically unrelated to directions from

corporate superiors and, therefore, such communications should be treated the same as communications with any third-party fact witness.

The second case the *Merck-Medco* court considered was *City of New York v. Coastal Oil New York, Inc.*, in which a federal court in the Southern District of New York addressed whether the plaintiff's counsel should be permitted to question a former employee of the defendant corporation regarding discussions with corporate defense counsel in preparation for and during a recess in the deposition. The *Coastal Oil* court concluded that there was no attorney-client privilege because corporate counsel did not represent the former employee and there was no evidence that the purpose of the discussion was to provide legal advice.

In a third case, *Peralta v. Cendant Corp.*, a federal court in the District of Connecticut denied a corporate defendant's effort to use the attorney-client privilege to block questions about communications between corporate counsel and a former employee. The *Peralta* court held that the privilege only applied to communications: (1) concerning knowledge obtained or conduct that occurred during the former employee's employment; or (2) relating to communications that were themselves privileged and that occurred during the employment. The *Peralta* court stated that the privilege would not apply to communications between corporate counsel and the former employee regarding the testimony of other witnesses or during breaks in the deposition. The *Peralta* court explained that allowing discovery regarding such communications was necessary because they could influence a witness to adjust or conform his or her testimony.

The *Merck-Medco* court adopted the reasoning of these decisions and held that "if the communication sought to be elicited relates to Ms. Elliott'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, the attorney-client privilege does not apply." (Emphasis in original). Thus, the court permitted the government to obtain additional testimony from Elliott in the four specified subject areas.

### Conclusion

Although the Second and Third Circuits have not yet addressed the issue, other Courts of Appeals, such as the Fourth and Ninth Circuits, have held that *Upjohn* applies to communications with former employees. Even if such communications are deemed to be privileged, however, corporate counsel should expect that their communications with former employees in preparation for deposition and otherwise litigating the case may be discoverable. Thus, counsel should proceed with caution.

*We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.*

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