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NEWMAN v. STATE:

An Attorney's Disclosure Under Rule 1.6 of the Maryland Rules of Professional Conduct Does Not Defeat a Client's Assertion of the Attorney-Client Privilege

By: Julia J. Messick

The Court of Appeals of Maryland held an attorney's disclosure under Rule 1.6 of Maryland Rules of Professional Conduct ("MRPC") does not defeat a client's assertion of the attorney-client privilege. *Newman v. State*, 384 Md. 285, 306, 863 A.2d 321, 333 (2004). In so holding, the Court concluded that an attorney who discloses information in order to prevent harm to others could not be compelled to testify as to that disclosure unless his or her client waives the attorney-client privilege. *Id.*

In 1999, Elsa Newman ("Newman") and Arlen Slobodow ("Slobodow"), parents of two children ("Lars" and "Herbie"), began divorce and custody proceedings. Stephen Friedman ("Friedman") represented Newman during the hearings. In spring 2001, at Friedman's request, Margery Landry ("Landry") attended meetings between Friedman and Newman to provide a "cool head in the room." *Id.* at 291, 863 A.2d at 324. During one meeting, Landry and Newman discussed harming one of Newman's children and blaming Slobodow.

On August 31, 2001, Newman said to Friedman, "[y]ou know I don't have to kill both children. I only need to kill Lars because I can save Herbie, and then [Slobodow] will go to jail and get what he deserves because he is a criminal, and I can at least save Herbie." *Id.* Shortly thereafter, Friedman disclosed Newman's statement to Judge Scrivener, the head of the Montgomery County Circuit Court Family Division. Judge Scrivener informed Judge Ryan, the judge presiding over the custody trial, and Judge Ryan ordered Friedman's appearance as Newman's counsel stricken.

On January 7, 2002, prior to the custody trial, Landry broke into Slobodow's home and, as he lay in his bed, shot Slobodow once in the leg. Slobodow pulled off Landry's mask and Landry fled the scene. Landry subsequently pled guilty to assault, burglary, reckless endangerment, use of a handgun in the commission of a felony, and obliterating the serial number on a gun.

On April 4, 2002, Newman pled not guilty to conspiracy to commit first-degree murder and conspiracy to commit assault in the first degree. At a pretrial hearing on June 28, 2002, the trial court determined Friedman could be compelled to testify because his disclosure under Rule 1.6 of the MRPC waived the attorney-client privilege. Newman objected to the court's decision to allow Friedman to testify at trial. During his testimony, Friedman disclosed both Newman's statement to him and to Landry regarding the harming of one of Newman's children.

On August 6, 2002, Newman was found guilty of conspiracy to commit first-degree murder, attempted first-degree murder, assault in the first degree, burglary in the first degree, and use of a handgun in the commission of a felony. The Circuit Court of Maryland for Montgomery County denied Newman's Motion for a New Trial. Subsequently, Newman appealed to the Court of Special Appeals, which upheld the trial court's conviction. The Court of Appeals of Maryland granted Newman's petition for *writ of certiorari*.

The Court of Appeals of Maryland, relying on the Supreme Court of Massachusetts' reasoning in *Purcell v. District Attorney for the Suffolk District*, 676 N.E.2d 436, 440-41 (Mass. 1998), held that an attorney's disclosure to prevent future harm to others does not waive the attorney-client privilege. *Newman*, 384 Md. at 306, 863 A.2d at 333. In its analysis, the Court of Appeals distinguished the attorney-client privilege, which applies to client communications, from confidentiality of client information under Rule 1.6 of the MRPC, which applies to the attorney's general duty to protect his or her client's secrets. *Id.* at 302-03, 863 A.2d at 331.

Moreover, the Court held that communications subject to the attorney-client privilege cannot be judicially compelled, whereas confidential information under Rule 1.6 of the MRPC may be judicially compelled. *Id.* at 304-05, 863 A.2d at 332. In the instant case, the Court held that because Newman's statement to Friedman was a "communication between the client and attorney" it was protected by the attorney-client privilege and therefore could not be judicially compelled. *Id.* at 306, 863 A.2d at 333.

Further, the Court of Appeals determined Friedman's witnessing of Newman and Landry's conversation was protected by the attorney-client privilege. *Id.* at 308-09, 863 A.2d at 335. Quoting *Rosati v. Kuzman*, 660 A.2d 263, 266-67 (R.I. 1995), the Court held the attorney-client privilege extends to situations where "the client reasonably underst[ands] the conference to be confidential

notwithstanding the presence of third parties.” *Newman*, 384 Md. at 307, 863 A.2d at 333. Thus, because Newman reasonably understood her meetings with Friedman and Landry to be confidential, her communications were protected by the attorney-client privilege. *Id.* at 307, 863 A.2d at 334.

Citing *E.I. du Pont Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 416, 718 A.2d 1129, 1139 (1998), the Court acknowledged that in most cases the presence of a third-party during an attorney-client meeting will destroy the attorney-client privilege. *Newman*, 384 Md. at 306, 863 A.2d at 333. However, relying on the analysis of the Supreme Court of Rhode Island, in *Rosati*, 660 A.2d 263, the Court of Appeals of Maryland found Newman did not waive her attorney-client privilege by allowing Landry to join her meetings with Friedman. *Newman*, 384 Md. at 308, 863 A.2d at 334. The Court reasoned, citing *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 691, 756 A.2d 526, 537 (2000), because Friedman, not Newman, suggested Landry be present during meetings, Newman’s attorney-client privilege was never waived. *Newman*, 384 Md. at 308, 863 A.2d at 334. According to the Court of Appeals, the attorney-client privilege may not be waived by the attorney, but instead must be waived by the client. *Id.* at 308, 863 A.2d at 334.

Additionally, the Court of Appeals explicitly adopted the crime-fraud exception to the attorney-client privilege. *Id.* at 309, 863 A.2d at 335. In so doing, the Court determined a client is prohibited from seeking “advice or aid in the furtherance of a crime or fraud” from his or her attorney. *Id.* Although Friedman testified that he felt as if he was being “sucked into their [Newman and Landry] plan,” the Court found no evidence to demonstrate Newman intended to solicit Friedman’s assistance. *Id.* at 312, 863 A.2d at 337. Thus, because Newman did not seek the “advice or assistance” of Friedman in her discussion of the crime, the crime-fraud exception did not apply. *Id.* at 311-12, 863 A.2d at 336.

In *Newman v. State*, the Court of Appeals not only determined the attorney-client privilege prevails over MRPC Rule 1.6 in relation to attorney testimony at trial, but also adopted and defined the crime-fraud exception to the attorney-client privilege. The Court demonstrated Maryland’s dedication to protecting the attorney-client relationship and ensuring attorney-client communications remain candid and allow open disclosure. Moreover, the Court enabled attorneys to protect third parties from possible harm, while ensuring attorneys will not be forced to testify against their clients.