When the Key Witness Is a Former Employee: Ethical and Professional Considerations from a Defense and Plaintiff's Perspective

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It is not uncommon to encounter former employee witnesses in our legal practices. Disgruntled and antagonistic? Let go for incompetence or as part of a corporate restructuring? Happily departed on good terms? Retired and insouciant? A supervisor who oversaw the employee whose conduct caused a plaintiff injury? A bartender on duty the night a drunk driver in a fatal crash had a final drink at her bar?

Depending on what their knowledge is, and depending on your side of the case, the former employees' knowledge can run the gamut from enormously helpful and illuminating to completely catastrophic. In all of these capacities, the former employee is a potential deep font of relevant knowledge, both helpful and harmful. Savvy lawyers typically seek out these witnesses to determine exactly what the witness knows and where on the harmfulness-helpfulness scale the witness falls.

This article shares some key legal and professional considerations we have encountered, often in different capacities when a former employee becomes a key to the case. Author **Chris Merrick** (pictured above) typically represents corporate defendants, while author Roman Galas recently switched from representing corporate defendants to representing plaintiffs.

Ethical Considerations When Making Contact

As a general matter, opposing attorneys may not contact individuals within the company's "control group" without potentially violating American Bar Association (ABA) *Model Rules of Professional Conduct* Rule 4.2 (RPC 4.2). *See also Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). Those in the control group are the officers, directors, and others who can bind the company for liability purposes or receive attorney communications within the scope of their duties. However, once these individuals leave their employment with the company, the prohibition against contact no longer applies. In fact, Comment 7 to RPC 4.2 explicitly states that "consent of the organization's lawyer is not required for communication with a *former* constituent." (emphasis added).

Even though RPC 4.2's consent requirement may not apply, attorneys must still navigate the complex ethical guideposts found in Rules 4.1, 4.3, and 4.4. When approaching former employees (whether in the control group or otherwise), attorneys are prohibited from using false pretenses to arrange an interview, or otherwise misrepresenting any material facts during discussions with former employees (or any other person, for that matter). RPC 4.1 is broad in scope and requires attorneys to be absolutely truthful when interacting with others on their client's behalf. This, of course, includes refraining from knowingly making "a false statement of material fact or law" in a direct communication with the former employee. A "false

statement" for purposes of this rule can also extend to more subtle acts, such as pretending to be someone else by creating a fake social media account, or using a friend's account, to "friend" the witness and gain access to information found in the witness's social media account.

Attorneys must also be up front with the witness about their role as an advocate. RPC 4.3, "Dealing with Unrepresented Person," speaks directly to this situation. It outright forbids attorneys from stating, or even implying, that they are a "disinterested" party. The safest course, as made clear in the comments to the rule, is to simply tell former employees up front who you are, who you represent, and why you want to speak to them. Where your client is the witness's former employer, this typically involves explaining to the witness that you represent the company, not him or her individually. If you know or have reason to believe the former employee still somehow misunderstands your role, attorneys have an affirmative duty under RPC 4.3 to "make reasonable efforts to correct the misunderstanding." On the defense side, this obligation is particularly important when the former employee left on good terms, and thus may naturally align with your side if he or she properly understands the nature of the request. The same is often true for the plaintiff's lawyer when dealing with disgruntled former employees, who may align more naturally with the plaintiff's side.

One proactive approach to guard against subsequent claims of impropriety in either scenario can be to accompany the direct communication with a written communication to the witness reiterating the attorney's role in the case and outlining the nature and scope of the inquiry. It may also behoove you to consider guidance for attorneys provided by a trial court in our home state of Pennsylvania:

1. the attorney is prohibited from eliciting or using any information that may be protected by attorney-client privilege;
2. the attorney must immediately disclose his or her capacity to the former employee;
3. any request by the person contacted that his or her personal attorney, or the company's attorney, be present must be honored; and
4. the attorney should advise the person that he or she has the right to refuse to be interviewed, or if he or she wishes, to be interviewed with the company's counsel present.

Wein v. The Williamsport Hospital & Medical Center, 45 Pa. D. & C. 4th 537, 543 (Pa.Com. Pl. 2000) (citing ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 91–359).

Finally, before contacting the former employee, it may be worth pausing to give a moment's reflection as to your motive for and method of doing so. RPC 4.4(a) prohibits lawyers from communications that have "no substantial purpose other than to embarrass, delay, or burden a third person" and from using "methods of obtaining evidence that violate the legal rights of such a person." For example, at least one court in Pennsylvania held that inducing a former employee to divulge privileged attorney-client communications that he or she may have had with his or her former employer's lawyer could violate this rule. *Pritts v. Wendy's of Greater Pittsburgh Inc.*, 37 Pa. D. & C.4th 158, 165 (Pa.Com.Pl. 1998). Threatening to press criminal charges (or similar actions such as regulatory violations or immigration proceedings) in an effort to coerce a former employee into talking with the lawyer or divulging certain specific information could likewise run afoul of RPC 4.4(a). *See, e.g.*, Philadelphia Bar Association Ethics Opinion 88–20, (opining "that

letters from lawyers threatening criminal prosecutions are inappropriate and that the tenor of the Rules prohibit them") (citing RPC 4.1 & 4.3).

Communications by Current (Non-Attorney) Employees with the Former Employee

Another unique ethical consideration can also arise in situations in which it is necessary for current employees to contact former employees, at the direction of counsel, as part of a corporate investigation or pending litigation. For example, under Rule 30(b)(6) of the Federal Rules of Civil Procedure, and similar state procedural rules, corporate representatives are required to testify about information that is "known or reasonably available to the organization" on designated topics. Many courts have found that this duty to collect "reasonably available" information can extend to information known to former employees. *See, e.g., U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (a corporation's duties under Rule 30(b)(6) may, and often does, extend to interviewing former employees, especially "where a corporation...no longer employs individuals who have memory of a distant event."); *Bank of N.Y. v. Meridien BIAO Bank Tanz., Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) ("The deponent must prepare the designee to the extent matters are reasonably available, whether from documents, *past employees*, or other sources.")(emphasis added); *Berwind Prop. Group, Inc. v Envtl. Mgmt. Group, Inc.*, 233 F.R.D. 62, 65 (D. Mass. 2005) (same); *Cf. Cupp v. Edward D. Jones & Co. L.P.*, 2007 U.S. Dist. LEXIS 23817, 2007 WL 982336, at *1 (N.D. Okla. Mar. 29, 2007) (declining to require a corporate party to contact its former employee in preparation for its Rule 30(b)(6) deposition but permitting the opposing party to depose the former employees).

In these situations, courts and state ethics boards have wrestled with the extent to which such client-to-client communications are protected by, or subject to, any applicable privilege. *See, e.g.*, ABA Committee on Ethics and Professional Responsibility, Formal Op. 11–461. This includes consideration of whether, and to what extent, the client itself is obligated to make any disclosures to the former employee when obtaining information in support of litigation or at the direction of an attorney. *See Id.* So, the mere fact that the non-attorney client is initiating the communication with the former employee may not, and often does not, open unrestricted access to the former employee, if the client is essentially acting as a conduit for communications from his or her lawyer.

When Confidentiality and Privilege Apply to Communications with Former Employees

Perhaps the most complex concern, and frequent source of friction among litigants, involves the scope of confidentiality and privilege that applies to the attorney's dealings with the former employee. Whether the company's lawyer or the plaintiff's lawyer, the fact is the employer's attorney is not the former employee's de facto lawyer in his or her personal capacity. Therefore, as with any third-party witness, discussions with former employees are not automatically treated as privileged or confidential in litigation (though the attorney's notes and other work product may be another story).

But there are some important exceptions to this general rule. Any communications that were privileged in nature when the individual was actively employed (e.g., protected communications with in-house counsel) do not lose their protection when the employee is terminated. *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999). So, lawyers representing the former employer may, in appropriate circumstances, inquire about the employee's conduct and knowledge, or communications with other lawyers for the employer, during the

time of *his or her employment*. These communications typically enjoy the same protections as would exist with a current employee. *Id.*; *see also Upjohn Co. v. U.S.*, 449 U.S. at 403 (Burger, C.J., concurring) (a "communication is privileged at least when, as here, 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." (emphasis added).

Discussions that extend beyond these limited bounds, particularly as it relates to sensitive issues such as trial strategy and new facts developed during litigation, may not be protected. As one court commented, "[i]f a lawyer is dumb enough to tell her trial strategy to a former employee of the client [with no ongoing duty of confidentiality regarding information learned post-employment], then opposing counsel is free to inquire about it and the former employee can answer questions in deposition without infringing on the attorney work product doctrine." *Corcoran v. HCA-HealthONE LLC*, 2022 U.S. Dist. LEXIS 91486, *11, 2022 WL 1605296 (D. Colo. May 20, 2022).

In addition to attorney-client and work-product privileges, confidentiality and non-disclosure agreements between a company and its former employee can provide an additional hurdle. Provisions in these agreements that prohibit the employee from voluntarily providing certain information to third parties (including attorneys) are often held enforceable. And, if an opposing attorney who has reason to know about such an agreement attempts to cause the former employee's breach, that action can itself be a breach of RPC 4.4. Where no agreement exists, and/or there is a prospect of irreparable harm to the company, it may be wise to seek a protective order governing the former employee's testimony. And, where there is no conflict associated with joint representation, a further option can be for the corporation's lawyer to also defend the former employee in his or her personal capacity or to enter into a joint defense/common interest agreement with the employee's individual counsel.

In summary, although a potential source of bountiful relevant knowledge, communications with a former employee also present a series of potentially thorny considerations that must be carefully considered and navigated—regardless of which party you represent. We hope our discussion of some of these issues will be a helpful guide in your practice the next time a former employee is key to your case.

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