Former Employees and Executives as Non-Party Witnesses in Employment Litigation
Navigating the Complexities of Privilege, Compensation, Cooperation With Counsel and Protection of Business Information

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Former Employees as Non-Party Witnesses

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Legal Considerations: The Attorney-Client Privilege

  – Adopted a version of the “subject matter” test. Communications are privileged if they:
    • Were made to the corporation’s counsel, acting as such;
    • Were made at the direction of corporate superiors for the purpose of seeking legal advice;
    • Concerned matters within the scope of the employees’ duties; and
    • The employees were aware they were being questioned so the corporation could obtain legal advice.
Legal Considerations:
The Attorney-Client Privilege

  – Majority opinion did not specifically address the question of former employees.
  – But Justice Burger’s concurring opinion stated that communications with former employees remain privileged.

• Courts now interpret *Upjohn* to hold that privileged communications between company counsel and employees do not lose their privileged status when employees leave the company.
Legal Considerations: The Attorney-Client Privilege

• Do communications with employees after they leave the company qualify for the same privilege?
    • TEST: “[D]id the communication relate to the former employee’s conduct and knowledge, or communication with defendant’s counsel, during his or her employment? If so, such communication is protected from disclosure by defendant’s attorney-client privilege under *Upjohn*.” Id. at 41.

• Most courts have followed *Peralta*’s lead.
  – *Pastura v. CVS Caremark*, No. 1:11-cv-400, 2012 U.S. Dist. LEXIS 94084 (S.D. Ohio July 9, 2012) (majority of federal courts find that *Upjohn* applies to former employees, but the privilege extends only to communications relating to information obtained in the course of employment).
Legal Considerations: The Attorney-Client Privilege

• For example:

  – *Surles v. Air France*, No. 00 Civ. 5004 (RMB)(FM), 2001 U.S. Dist. LEXIS 10048, at *17 (S.D.N.Y. July 19, 2001) (communications with former employee are privileged “if they are focused on exploring what the former employee knows as a result of his prior employment about the circumstances giving rise to the lawsuit”).

  – *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004) (“[I]f the communication sought to be elicited relates to [the former employee’s] conduct or knowledge during her employment … or if it concerns conversations with corporate counsel that occurred during her employment, the communication is privileged.” (emphasis in original)).
Legal Considerations: The Attorney-Client Privilege

• Other courts have rejected *Peralta*. For example:
    • Communications made *during* employment;
    • Communications made pursuant to former employee’s “present connection” to or agency relationship with the employer; or
    • Communications concerning a confidential matter that was uniquely within the knowledge of the former employee when he worked for the employer.
Legal Considerations: The Attorney-Client Privilege

- *Krys v. Sugrue (In re Refco Sec. Litig.)*, 08 Civ. 3065 (JSR), 08 Civ. 3086 (JSR), 2012 U.S. Dist. LEXIS 27480 (S.D.N.Y. Feb. 28, 2012). Employer was defunct; all rights and privileges were transferred to plaintiff liquidators. District court found that communications between former employee and liquidators’ counsel were not privileged because:
  - Former employee was represented by independent counsel and affirmatively represented that the liquidators’ counsel did not represent him.
  - The communications “were not intended to provide legal advice” to the employer, a defunct entity, nor could the former employee be considered a client or agent of the defunct entity.
  - The plaintiff liquidators had indicated that they had live claims against the former employee.
Legal Considerations: The Attorney-Client Privilege

• Choice of law.
  – Restatement of Conflict of Laws, Section 139, Comment (e): the state with the most significant relationship will usually be the state where the communication took place.
  – It is important to research or confer with local counsel regarding attorney-client privilege law of the jurisdiction where you will be interviewing the former employee.
Legal Considerations: The Attorney-Client Privilege

• *Note*: Special rules apply in Illinois.
  – Illinois courts reject the “subject matter test” of *Upjohn*, use the “control group” test instead.
Legal Considerations: The Attorney-Client Privilege

• Who owns the privilege?
  – If the former employee is the “wrongdoer,” he may wish to hide behind the privilege.
  – But the privilege belongs to the employer, not the employee.
Legal Considerations: Attorney Work Product Protection

• The Attorney Work Product Doctrine may also protect communications with former employees.
  – Generally, counsel’s conversations with a former employee about “legal conclusions or legal opinions that reveal the defendant’s legal strategy” are protected. *Peralta*, 190 F.R.D. at 41.
  – *But see Clark Equip. Co. v. Lift Parts Mfg. Co.*, No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457, at *15 (N.D. Ill. Oct. 1, 1985) (“If counsel, in discussions with third parties, reveals his mental impressions, etc. to such third parties, any claim of work product privilege is waived.”).
Legal Considerations: Cooperation - Plaintiff’s Counsel

- Plaintiff’s Counsel:
  - Let your client guide you.
  - Look for the “me too” prototype.
  - Who should approach the witness – you or your client?

- There is some cooperation you want, and some you don’t.
  - **Computer Fraud and Abuse Act** (18 U.S.C. § 1030). Criminalizes taking information from a protected computer without authorization. Violators can be *criminally and civilly* prosecuted.
Legal Considerations: Cooperation - Plaintiff’s Counsel

• What if the former employee wants to “join the team”?
  – Be wary of solicitation (ABA Model Rule 7.3).
    • Be clear in your intentions; the purpose of your call or meeting should be investigative only.
    • Don’t affirmatively offer your services.
  – Be wary of conflicts of interest (ABA Model Rule 1.7).
    • Get informed consent from both parties.
Legal Considerations: Plaintiff’s Counsel - Contact with Former Employees

• Does Plaintiff’s counsel need consent of the company to contact former employees?
  – The 2002 Amendments to the comment on ABA Model Rule of Professional Conduct 4.2 provide that “consent of the organization’s lawyer is not required for communications with a former constituent.”
    • See, e.g., EEOC v. Univ. of Chicago Med. Ctr., 11 C 6379, 2012 U.S. Dist. LEXIS 53298, at *9–10 (N.D. Ill. Apr. 16, 2012) (noting that the “majority view” is that protections of Rule 4.2 do not attach to former employees, even those in managerial positions).
  – But some jurisdictions do limit *ex parte* communications.
Legal Considerations: Cooperation – Employer’s Counsel

• Employer’s Counsel: Equip yourself.
  – Get all available materials from your client.
  – Investigate the terms on which the person left.
  – Consider who reaches out – you or client.

• Carefully assess the former employee.
  – Determine if the former employee is emotionally invested in company.
  – Hard sell versus soft sell.
Legal Considerations: Cooperation – Employer’s Counsel

Three categories of former employees:

1) The positive witness.

2) The negative witness.
   – Don’t court a hostile witness - don’t share information, don’t send documents.
   – Will they switch sides?
   – Prepare yourself for trial:
     » Establish impeachment material - bias, animus, motive.
     » Hostile witness as teacher.
     » Hostile witness as mock juror.
     » Be ready to show that the witness has no helpful information.

3) The neutral witness.
   – Consider the pros and cons of securing a declaration.
   – Consider cutting your losses - sometimes the goal is surviving rather than thriving.
Topics

• Cooperation Agreements
  – Basic Elements
  – Involuntary Participation
  – Protecting Confidential Information/Recognize & Honor Attorney-Client Privilege

• Witness Compensation
  – ABA Model Rules
  – Jurisdictional Issues
  – Reasonableness
  – Consulting Agreement
Cooperation Agreement

• A former employee’s decision to refuse to cooperate has the potential to cause serious damage in subsequent employment litigation

• The former employee could:
  – Refuse to appear voluntarily on behalf of the company
  – Voluntarily and on own initiative provide assistance/encouragement to the adverse party
  – Refuse to cooperate in connection with a subpoena
Cooperation Agreements

• A well-drafted cooperation agreement could result in the former employee cooperating in the litigation or discourage the former employee from inducing another private party to initiate an action against the employer.
Cooperation Agreements

• Basic elements of a cooperation agreement:
  1) Consideration
    • Necessary to create a binding contract.
    • The consideration can take a number of forms, but whatever is used should increase in value over time so as to retain and extrajudicial form of leverage over the former employee.
    • Amount must be reasonable
      – Be mindful of limitations on paying witnesses for testimony
Cooperation Agreements

2) Future Cooperation Requirement

• Requires the former employee to fully cooperate in any litigation or investigatory matters, especially those in which the former employee would be a witness significant to the matter.

• Should include requirements such as a mandate to meet with and provide any requested information to the company’s attorneys, a requirement to consent to depositions and interviews, and a requirement to testify as a witness on behalf of the employer in any type of proceeding not specifically excluded from the agreement.
Cooperation Agreements

3) Prohibition of Voluntary Participation

• Limits the former employee’s ability to voluntarily participate in or provide assistance to a legal action brought against the employer.

• Should include a provision restricting the former employee from inducing, soliciting, or encouraging a private party to bring an action against the employer.

• Should include a requirement that the former employee notify the employer within a set period of time (i.e. 48 hours) after an attempt by a private party to contact the former employee.

• This provision is critical, as ABA Model Rule 3.4(f) restricts the ability of an attorney to request a person other than a client from voluntarily giving information to another party unless the lawyer believes that withholding such information will not adversely affect the person’s interests.
Note of Caution

• SEC, NLRB & EEOC have launched recent challenges to aspects of cooperation/severance/settlement agreements that might constrain a former employee’s ability to interact with and give support to other employees or former employees who might be exploring or asserting claims against the employer.
Cooperation Agreements

4) Requirement of Involuntary Participation

• Mandates the former employee to give notice and cooperate with the employer if the former employee is subpoenaed or required by another means to participate in an investigation of the employer.

• This is a significant provision, as it provides time for the employer’s attorneys to object to the compulsory process request and, if that fails, to prepare the former employee.

• Should include specifics, such as a requirement to meet with the employer’s attorneys upon request and to provide any requested information to the employer’s attorneys.
Cooperation Agreements

5) Non-disparagement Provision

• Provides that the former employee will not criticize the employer in public in any way.

• Should include a prohibition against publically disparaging the employees, board members, and officers of the employer along with the employer.

• Consider including a restriction of the former employee’s ability to publically disparage the employer on social media outlets such as Twitter, LinkedIn, and Facebook.
Cooperation Agreements

6) Protecting Confidential/Privileged Information

• Provides that the former employee will not disclose non-public, privileged, confidential, or proprietary information about the employer obtained because of the former employee’s role.

• Should include an exception for when the disclosure is expressly allowed for by the employer or required by law.

• If the disclosure is required by law, such as if the former employee is subpoenaed, the involuntary participation provision of the cooperation agreement will ensure that the former employee provides notice of this request to the employer’s attorneys.
Cooperation Agreements

• *Do not* include provisions that:
  – Require the former employee to withhold non-confidential information.
  – Provide consideration explicitly “for” or “because of” the former employee’s testimony.
  – Provide consideration of an overly-high, unreasonable value, as the agreement may be deemed as payment for testimony.
Witness Compensation

• ABA *Model Rules of Professional Conduct* Rule 3.4 (“Fairness To Opposing Party And Counsel”)
  – “A lawyer shall not:
    • “(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”

• Comment to Rule 3.4(b)
  – “With regard to paragraph (b), it is not improper to pay a witness’ s expenses or to compensate an expert witness on terms permitted by law.”
Potential Adverse Consequences of Improper Witness Compensation

- Witness credibility tainted or diminished
- Court instructs jury to consider the affect of agreement on veracity of the witness [Caldwell v. Cablevision Systems Corp., 925 N.Y.S.2d 103 (Sup. Ct. App. Div. 2011)]
- Witness testimony barred or otherwise limited
- Mistrial where the compensation arrangement has not been revealed at or before trial [U.S. v. Cinergy, 2008 WL 7679914 (S.D. Ind. 2008)]
- Ethical sanctions
- Attorney malpractice claims
Witness Compensation

• The majority of states now permit payments for expenses and lost time.

• According to the ABA, reasonable payments do not violate Rule 3.4 if the payments are made for compensating the witness for expenses incurred and time lost in order to assist with the litigation.

• Some state bars, like those in California and Colorado, allow payments for the witness’s preparation time. Other state bars, like the Pennsylvania bar, do not.
Exceptions Under Federal Anti-Bribery Statute

• 18 U.S.C. § 201(d) provides exceptions for certain payments to witnesses where such payments are of “provided by law,” or represent payment of the reasonable expenses or the reasonable value of time lost by a witness. In relevant part the statute provides that the anti-bribery statute:
  – “shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding . . . .”
  – What about preparation time?
Witness Compensation

- Jurisdictional issues:
  - What if the non-party witness lives a state other than the forum state?
  - ABA Model Rule 8.5(b):
    - In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
      - (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.
Key Points to Contemplate When Considering Payments to Witnesses

• Determine the law of the jurisdiction whose ethical rules and decisional precedents will govern the issue of witness payments [Model Rule 805 would posit the law of the location of the tribunal]

• Review the ethical rulings and decisional precedents for the relevant forum and those of any other forums that arguably may be asserted

• Develop reasoned and supported bases for the valuation of the witnesses time and set forth those bases in a written agreement

• Be careful to take into account other consideration that might be flowing to witness outside the limited context of payments for witness preparation and testimony [releases of claims, payments for consulting]

• Inform opposing counsel and provide agreement to them
Witness Compensation

• Factors to consider when determining whether the amount of a payment to a former employee is “reasonable”:
  – The witness’ s personal knowledge of the matter of the litigation and the value of her time
  – The witness’ s years of experience with the employer
  – The witness’ s current employment status
  – The nature and subject matter of the litigation
Making Sure Compensation is Reasonable

• If the former employee now runs his own consulting business, he generally should or can be paid his regular hourly rate. *See Prasad v. MML Investor Services, Inc.*, 2004 WL 1151735 at *7 (S.D.N.Y. May 24, 2004). Otherwise, he should be paid a fee that is reasonable based on all of the relevant circumstances, such as his relevant experience and the complexity of the assignment. *See ABA Formal Op. 96-402; Centennial Management Services, Inc. v. AXA Re Vie*, 193 F.R.D. 671, 680 (D. Kan. 2000).

• Make sure to monitor the former employee to ensure that the total amount of time he expends preparing to testify is reasonable. *See Centennial Management*, 193 F.R.D. at 680.
Witness Compensation

• Consulting agreements
  – In many cases, the employer may enter into a consulting agreement with the former employee who is also expected to be a witness.
  – Consulting agreements cannot be a disguised method of providing excessive payment for a witness’ testimony.
  – Make sure there is a demonstrable and legitimate need for services beyond testimonial aspect
  – When drafting the consulting agreement, assume that it will be disclosed at trial.

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Witness Compensation

• Courts are wary of coupling consulting agreements with provisions indemnifying or agreeing not to sue the former employee.
  – In *New York v. Solvent Chem. Co.*, 166 F.R.D. 284 (W.D.N.Y. 1996), the court held that such provisions in a consulting agreement with a former executive “went too far.”
  – As a result, the court required the employer to produce: the consulting agreement and all related documents, all documents shown or provided to the former executive in preparation for his deposition, all documents reviewed by the former executive pursuant to the consulting agreement, all communications between the employer and the former executive, and all notes prepared by the former executive related to his work under the consulting agreement.
Witness Compensation

• Courts are wary of consulting agreements entered on the eve of or during the witness’s deposition or trial testimony.
  – The court in Goldstein v. Exxon Res. Eng’g Co., No. Civ. 95-2410, 1997 WL 599612 (D.N.J. Feb. 28, 1997) held that the purpose of a consulting agreement consummated between a former supervisor and the defendant employer on the second day of the former supervisor’s deposition was to “pay” for the time the former supervisor’s testimony and not merely to reimburse him for his out-of-pocket expenses and lost time.
  – As a result, the court mandated complete disclosure of the agreement and allowed for the plaintiff’s attorney to examine the former supervisor as a hostile witness.
Best Practices for Defense Counsel: Preliminary Considerations

• Before litigation:
  – Be proactive.
  – Encourage a positive HR and corporate culture.
  – Exit interviews.
  – Maintain good relationships with former employees.

• At onset of litigation:
  – Consider calls or notices to former employees reminding them of their obligations to keep privileged communications and materials confidential.
Best Practices for Defense Counsel: Interviews with Former Employees

• Before meeting with a former employee, determine:
  – When were the exact dates of employment?
  – What conversations did the witness have between those dates with in-house or outside counsel?

• If the employee had privileged conversations with counsel during her employment, again remind her that those conversations are privileged!

• Do not discuss your legal strategy or any facts you have learned in litigation with a former employee.
Best Practices for Defense Counsel: Interviews with Former Employees

• Do not tell a former employee to not speak with opposing counsel!
• ABA Model Rule of Professional Conduct 3.4(f): “A lawyer shall not … request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”
  – However, you can and should tell the witness that he will likely be contacted by counsel, and that it is up to him whether or not to speak with that person.
Best Practices for Defense Counsel: Interviews with Former Employees

• Can you ask to be present at the former employee’s interview with opposing counsel?
  – A request to be present during conversations with opposing counsel is generally permissible.
  – An instruction is not.
Best Practices for Defense Counsel: Depositions of Former Employees

- Are deposition prep sessions and/or conversations at breaks during a deposition privileged?
  - In *Peralta*, the court refused to extend attorney-client privilege to discussions between former employee and company counsel during the break of a deposition regarding how the witness should approach a particular line of questioning. 190 F.R.D. at 41–42.
Best Practices for Defense Counsel: Representation of Former Employees

• Can the company’s counsel represent the former employee at his deposition?
  – Generally, yes.
  – At least one court suggests that counsel should not offer to represent the witness. Only represent the witness if he asks.

Best Practices for Defense Counsel: Representation of Former Employees

- Will representing the former employee shield conversations between the witness and counsel from disclosure?
Best Practices for Defense Counsel: Former Employees at Trial

• How former employee can be effective (Swiss Army Knife):
  – Can identify other witnesses and documents.
  – Can be an “anti-plaintiff”: a similarly situated employee who had the opposite experience.
  – Can testify regarding the absence of plaintiff’s complaints or claims pre-lawsuit.
  – Can humanize the plaintiff’s antagonists, e.g., managers, supervisors, executives who may be co-defendants.
  – Can help be the face of the company or the face of the employee ranks—both of whom may be accused of wrongful conduct.
Best Practices for Defense Counsel: Former Employees at Trial

• Presenting a former employee as a witness at trial:
  – Establish that witness is no longer drawing a paycheck and point to other credibility boosters.
  – Establish that witness left the company on good terms (in other words, it can be done despite plaintiff’s claims to the contrary).
  – Front any bad optics that may compromise credibility.
  – Thwart suggestions of antipathy toward plaintiff.
  – Establish consistency of witness’s statements.
    • Use contemporaneous statements and documents extensively.
    • Corroborate testimony with other witnesses.
• Consider use of deposition at trial.
  – Former employees may be out of the subpoena power of the court.