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Outside Counsel

Navigating the Minefield of Contacting Former Employees of Corporate Parties

By **Alan R. Levy**

One of the more confusing aspects of representing corporate entities is the situation of where a former employee of your client is an essential fact witness. In the realm of civil litigation, these types of witnesses could fit one of numerous different examples: (1) a retail store manager who filled out the accident report following the customer's slip/fall accident; (2) an engineer who designed or marketed the product on behalf of the manufacturers, which is the subject of a products liability case; (3) an employee who happened to witness an incident which is the subject of a civil lawsuit, or one of numerous other examples.

Clearly, the attorneys for all parties will want to contact this witness, ex parte, to see what their version of events is. Depending how helpful that witness' testimony will be, a party may want to obtain a sworn affidavit of the former employee, and/or conduct a deposition or Examination Before Trial of the witness to "lock in" their sworn testimony. Of course, the level of cooperation the former employee provides, will often depend greatly on whether or not they left their employment on good terms or "not-so-good" terms.

> If you do represent a former employer and wish to speak to a former employee, be forewarned that the "devil is in the details" as to how you communicate with that former employee.

Obviously, if you are counsel for a witness' former employer, and the ex-employee holds a grudge, is non-communicative, or has indicated they do not wish to speak with or cooperate with you, while that may be harsh, there is very little you can do about that. However, if you represent a former employer, and the former employee is willing to speak with you, one must often juggle somewhat confusing duties and ethical obligations.

The most common, albeit confusing, scenario is if one of the parties in a litigation makes a demand to conduct a deposition of that particular former employee. Of course, if the witness is still an employee, the employer is generally obligated to produce that employee for testimony pursuant to CPLR §3101(a)(1).

However, if a former employee is no longer employed at the time of the receipt of the Notice of Deposition, the employer is not obligated to produce that witness for a deposition. See *Carroll v. City of New York*, 155 A.D.3d 555 (1st Dept. 2017); *Sparacino v. New York*, 85 A.D.2d 574, 437 N.Y.S.2d 428 (2d Dept. 1981) ("It was error to thrust upon defendant, the burden of producing its former employee, ... a non-party witness whose examination was sought by plaintiffs-respondents."); *DiMare v. NYC Transit Auth.*, 81 A.D.2d 574 (2d Dept. 1981); *McCormick v. Mars Assocs.*, 25 A.D.2d 433 (2d Dept. 1966).

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Simply put, "the well-established general rule in this State is that the courts are without power to compel a party to produce a *former employee* for an examination before trial. *Frankel v. French & Polyclinic Medical School & Health Center*, 70 A.D.2d 947 (2d Dept. 1979) (emphasis in original) citing *McGowan v. Eastman*, 271 N.Y. 195 (1936).

So, what happens when the former employee is served with a Subpoena Ad Testificandum by a party which is adverse to the interests of the former employer? Assuming the witness is willing to speak with you, one of the first questions that arises is whether the law firm currently representing the former employer can also provide representation to the former employee? Alas, an analysis of the relevant case law in New York state can be somewhat confusing and provide contradictory guidance.

Resolving this question begins with *Niesig v. Team I*, 76 N.Y.2d 363 (1990), where the New York Court of Appeals faced the question over whether plaintiff's attorneys could speak ex parte to employees of defendants represented by counsel. The court held that a blanket rule against any contact with employees was too broad, and the so-called "control group" test which only included senior management exercising substantial control over the corporation was too narrow.

Moreover, the court stated that informal discovery and investigation by counsel was a "vital" part of representing one's client. So the court created a confusing and vague balancing test that stated employees were defined as a "party" if their acts or omissions in the subject matter were binding on the corporation or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees could be interviewed ex parte and informally.

The legal doctrines laid out by the *Niesig* case still leaves an unanswered question as to the relationship of the counsel for the former employer and the former employee who has been served with a Subpoena Ad Testificandum. Obviously, if you are counsel for the former employer, and the former employee is willing to cooperate with you, your best case scenario is if the former employee is will agree to be represented by the same law firm; assuming that the same law firm can represent both the former employer and the former employee for the purposes of the deposition. This is where New York law can get very complicated and even counter intuitive.

> The level of cooperation the former employee provides, will often depend greatly on whether or not they left their employment on good terms or "not-so-good" terms.

First, it is well settled that "a party's right to be represented 'by counsel of its choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted.'" *Mediaceia v. Davidov*, 119 A.D.3d 911 (2d Dept. 2014) quoting *Zutler v. Drivershield*, 13 A.D.3d 397 (2d Dept. 2005).

In any event, the question still remains whether you can represent the former employer and former employee, so that conversations with that former employee are privileged communications, and if the former employee is subpoenaed, you can represent them at their deposition.

New York law has generally allowed counsel for civil corporate entity defendants to also represent non-party witnesses at depositions. See *Maxon v. Woods Oviatt Gilman*, 45 A.D.3d 1376 (4th Dept. 2007), appeal dismissed, 12 N.Y.3d 840 (2009); *Alba v. New York City Tr. Auth.*, 37 Misc.3d 838 (N.Y. County 2012), although there are some notable exceptions and potential hurdles, especially the problem with alleged "solicitation."

One of the hurdles related to representing a non-party at a deposition was that, for a brief period of time, the Fourth Department held that an attorney for a nonparty could not make an objection at the deposition and was not permitted to instruct their client not to answer an improper question even if that question that sought privileged information. See *Thompson v. Mather*, 70 A.D.3d 1436 (4th Dept. 2010); *Sciara v. Surgical Assoc. of W. N.Y., P.C.*, 104 A.D.3d 1256 (4th Dept. 2013). Essentially, a nonparty's attorney was relegated to "potted plant" status. In any event, CPLR §3113(c) was amended in 2014 to explicitly abrogate *Thompson*, and allow attorneys for nonparties the right to make objections at depositions.

Nevertheless, some judges may be unaware of the 2014 amendment to CPLR §3113(c). Specifically, there is the case of *Grech v. HRC*, 48 Misc.3d 859 (Queens County Sup. Ct. 2015), which dealt with a plaintiff's counsel seeking to represent non-party witnesses at a deposition demanded by a defense counsel.

In that case, plaintiff's counsel identified two non-party eye-witnesses to the accident. When defense counsel attempted to speak with the witnesses informally, they refused to cooperate. When defense counsel served the non-party witnesses with subpoenas, plaintiff's counsel advised that he was representing them for the purposes of the subpoenaed deposition. The court granted defendant's motion to disqualify plaintiff's counsel from representing the non-party witnesses, because the actions of plaintiff's counsel would gain a "tactical advantage."

The court also noted that "by virtue of [plaintiff's counsel's] dual representation, counsel would obtain yet another tactical advantage which would permit her to make objection at the depositions for the nonparty witness that she would otherwise not be entitled to make were she not also counsel for plaintiff (See *Thompson v. Mather*)." Alas, the court in *Grech* failed to understand that the 2014 amendment to CPLR 3113(c) had already abrogated *Thompson*.

As for the question of "solicitation," there are three published decisions that have dealt with precisely this issue, and all three decisions appear to provide contradictory and troubling guidance.

First, in *United States v. Occidental Chemical*, 606 F. Supp. 1470 (W.D.N.Y. 1985), the federal court held that under New York law, a law firm defending a corporation was allowed to represent former employee nonparties at their depositions. However, the court held that the New York State Code of Professional Responsibility's prohibition against "solicitation" mandated that the defense firm was prohibited from contacting the former employees for the purpose of offering them representation; although requests for representation initiated by the former employees was permissible.

Second, in *Rivera v. Lutheran Med. Ctr.*, 22 Misc.3d 178 (Kings County Sup. Ct. 2008), aff'd 73 A.D.3d 891 (2d Dept. 2010), plaintiff's counsel was seeking to conduct informal interviews with former employees in an employment termination matter. Counsel for the defendant employer contacted several former employees and advised them that they were offered legal representation by the defense counsel on an individual basis, and said cost of representation would be paid by the former employer.

The court held that defense counsel's actions were "an end run around the laudable policy consideration of *Niesig* in promoting the importance of informal discovery practices in litigation, in particular, private interview of fact witnesses." Furthermore, since defense counsel solicited these nonparties as clients in violation of the Code of Professional Responsibility, they were disqualified from representing the former employees.

Finally, in *Dixon-Gales v. Brooklyn Hosp. Ctr.*, 35 Misc.3d 676 (Kings County Sup. Ct. 2012), the court not only allowed counsel for the defendant to represent nonparty former employees, but also stated that there was no improper solicitation because the employer, "pursuant to its self-insurance plan, provides legal representation to its present and former employees with respect to allegations of malpractice within the scope of their employment."

When all three of these cases are viewed together, not only is there no clear guidance provided to attorneys representing former employers, but also the lesson that should be learned is to be more cunning in how one communicates with former employees.

In the *Occidental* case, the court issued an order barring the defense counsel from sending a letter to the former employees advising them that the firm would represent them, free of charge, in the event that they were asked to appear at depositions. The court in *Rivera* went even further in a more troubling fashion. In that case, the employer's defense attorneys were barred from representing former employees because the solicitation of the former employees had already taken place. Hence the bell had already been rung:

> According to Morgan Lewis, the nonparty witnesses were contacted by Morgan Lewis and informed that LMC was offering to have Morgan Lewis represent them on

an individual basis in connection with this matter, at LMC's expense. They were told this was entirely voluntary on their part, and that they would suffer no retaliation if they declined representation or did not wish to otherwise cooperate with LMC's defense. Each of them "verbally" requested Morgan Lewis's representation. Retention letters were subsequently forwarded under separate cover (see Kronick aff P 7).

These witnesses are not parties to the litigation in any sense and there is no chance that they will be subject to any liability. They were clearly solicited by Morgan Lewis on behalf of LMC to gain a tactical advantage in this litigation by insulating them from any informal contact with plaintiff's counsel. This is particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of *Niesig* in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court.

What exactly did the defense attorneys in *Rivera* do wrong? They offered to provide representation to the former employees, if the former employee voluntarily wanted one. Also, they told the former employee that they would suffer no retaliation if they declined. So, is the court saying counsel for the former employer can contact a former employee in order to conduct a fact interview, but can't offer to represent them if they get subpoenaed? The court appears to be encouraging attorneys to be more cunning in how they have the conversation with the former employee. Simply put, the *Rivera* and *Occidental* decisions are simply telling attorneys who represent former employers to open up conversations with former employees as follows: "You have the right to retain me as counsel, free of charge, but I can't make the offer to represent you free of charge. *You have to ask me first…*"

This is as silly as the belief seen on TV and movies that an undercover police officer has to disclose that they are a member of law enforcement if they are asked, "You're not a cop, right?"

Now compare *Rivera* to *Dixon-Gales*, where the court stated that it was okay for the former employees to be contacted by defense counsel because the employer, "pursuant to its self-insurance plan, provides legal representation to its present and former employees with respect to allegations of malpractice within the scope of their employment." How is the conduct of the former employer in *Dixon-Gales* any different than that in *Rivera* or *Occidental*?

Also, I would respectfully contend that any court's denunciation of attorneys trying to gain a "tactical advantage" is utter lunacy. The American legal system is based on the concept of adversarial proceedings, where the job of an attorney to zealously advocate their client's interests. Does an attorney's ethical duty not also include seeking out all tactical advantages that are allowable under the law and court rules? If a defendant chooses to file a summary judgment motion rather than defend themselves at a trial, isn't that an allowable strategic effort in order to gain a tactical advantage? Hence, why is it not allowable to make all reasonable efforts to obtain and preserve testimony from a former employee who is willing to accept representation of a law firm that also represents their former employer?

In any event, if you do represent a former employer and wish to speak to a former employee, be forewarned that the "devil is in the details" as to how you communicate with that former employee, and whether you retain the right to represent that former employee if they get subpoenaed to testify at a deposition.