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Can We Talk? A Closer Look at Some Thorny Issues With Communications by In-House Counsel

By Brian A. Katz and Jeremy M. King

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Perhaps more so than any other practicing attorney, in-house counsel spend a great deal of time communicating—and the variety of personnel on the other end of that line, Zoom feed, or email chain is truly staggering. But with so much emphasis on communication, and so much emphasis on communications being efficient and in real-time, in-house counsel can forget that not all communications are equal: certain communications by in-house counsel with certain parties may be privileged (or not), prohibited—and in extreme cases, potentially unethical or otherwise fraught with peril—particularly when the specter of litigation is on the horizon. This article covers some of the more delicate dynamics that can surface for in-house counsel in communicating with certain parties and identifies various legal, practical and ethical considerations when those issues arise.

I. The Former Employee

The combination of a constantly shuffling workforce and the lengthy duration of dispute resolution make it increasingly likely that former employees will play a significant role in ongoing litigation. As such, communicating with former employees on topics germane to the litigation is likely unavoidable. Although such communications are often conducted by outside counsel, there can be several important strategic reasons why such communications should go through in-house counsel, including familiarity with the individual employee, the anticipated comfort level of a former employee speaking with a former colleague, as opposed to an outside lawyer, and cost considerations, among others. In pursuing such communications, however, in-house counsel embarks on an uncertain path of discovery that, while necessary, may reveal facts that are harmful or problematic for the litigation itself. As such, these communications raise several considerations of which the in-house attorney should be aware and take steps to navigate correctly in order to avoid unintended pitfalls. Paramount among those issues is the application of the attorney-client privilege, addressed below.

There is a split of authority on whether communications between corporate counsel and former employees are privileged.[1] While the issue has yet to be definitively settled in New York, many decisions— following the lead of the seminal U.S. Supreme Court 1981 decision in *Upjohn v. United States*, 449 U.S. 383 (1981)—have held that communications with a former employee are indeed subject to the attorney-client privilege.[2]

In contrast, certain jurisdictions refuse to acknowledge that the attorney-client privilege extends to communications with former employees. One of the often-cited decisions on this topic is the decision in *Newman v. Highland School Dist.*,[3] which conspicuously held, "[E]verything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship." Once the agency relationship terminates, the court held, the essential source of the privilege was extinguished. *Id*. While the "*Upjohn*-approach" remains the majority rule, certain jurisdictions do, like Washington with *Newman*, cut off the privilege with the termination of employment.

As the law of privilege is fundamentally a creature of state law, it is incumbent on in-house counsel to determine whether a prospective communication *will be* privileged before initiating contact. Knowing whether an interview will be protected from disclosure in an adversarial setting can help navigate the choppy waters of discovery.

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In-house counsel should conduct any interview with a former employee with great care. While facts themselves are not shielded from discovery by privilege, a hasty decision to interview a former employee could result in later disclosure of in-house counsel's thoughts, mental impressions, and litigation strategy if care is not taken to ensure that the discussion with the former employee itself is protected by privilege. In-house counsel should consider the following:

- Understanding the role of the former employee while at the company, and to the extent possible, the reasons why counsel believes the former has knowledge of the circumstances giving rise to the interview.
- The terms under which the former employee departed, including whether the employee is obligated to cooperate pursuant to a cooperation clause in a separation agreement.
- Know the state law on privilege relative to communications with former employees (this may be a function of knowing not only in which jurisdiction litigation is likely to ensue, but the domicile of the former employee).
- If counsel believes the privilege exists, advising the former employee that the company, and not the individual, own the privilege and the former should not disclose privileged communications between him or her and counsel.

II. The Current Employee

Communications between in-house counsel and current employees may seem to be a safer subject, but pitfalls exist for the unprepared lawyer conducting such interviews. *Upjohn* also outlines the scope of privilege protections for interviews of employees. Technically, the in-house counsel's client is the corporate entity, not the employees. But the reality of corporate life requires in-house counsel to regularly speak with employees about matters critical to the legal advice being provided to the corporate client. The Supreme Court set forth certain rules to follow if in-house counsel seeks to have such interviews treated as privileged.

The Court endorsed protecting communications via privilege if they were:

1. with employees that had relevant information because of the scope of their employment;
2. made in a confidential setting;
3. made to an attorney for the company in that attorney's role as counsel;
4. communications made at the direction of corporate management; and
5. made for the purpose of providing legal advice to the corporation and the employee was aware of that purpose.

In order to preserve privilege, in-house counsel should now regularly provide the employee with a warning prior to the interview substantially as follows:

- I am an attorney representing the company and I am investigating [subject of investigation] so that I can provide legal advice to the company.
- I think that you, as an employee, may have information relevant to my investigation.
- The company is my only client; I am not your personal counsel. If you want to retain your own lawyer, you may do so.
- Your communications with me are confidential and protected by the attorney-client privilege. I request that you keep our communications confidential.
- The attorney-client privilege belongs to the company, and the company may waive the privilege and disclose your communications with me to third parties.

In-house counsel should also bear in mind that communication with an employee will trigger their ethical obligations with respect to discussions with an unrepresented party. The foregoing warnings also protect the in-house counsel by providing the employee with the disclosure required by the Model Rules of Professional Conduct.

III. The Adversary's Former Employee(s)

The realities of the business world often result in common connections and associations that provide avenues for in-house counsel to speak directly with former employees of a litigation adversary, to say nothing of the ever -increasing responsibilities of in-house counsel in litigation, as fact finders and advisors among other roles, which may put in-house counsel in the position of connecting with an adversary's former employee. Such communications are not *per se* prohibited, but counsel (whether in-house or otherwise) must be mindful of the applicable rules.

First, communications with an adversary's former employee implicate, but likely do not violate, an attorney's ethical obligations. Model Rule 4.2 prohibits attorney contact with a represented party. The New York Court of Appeals has held[4] that this rule (under the former disciplinary rules) allows for attorneys to interview certain current employees even without their employer's consent under certain circumstances. Importantly, the Court also ruled that the "no contact" does not apply at all with respect to communications with former employees. Many courts around the country follow this rule, but counsel with matters involving other jurisdictions should check their obligations carefully. For example, New Jersey rules[5]

create a category of individuals that opposing attorneys are prohibited from contacting, and Pennsylvania courts have fashioned a multi-part test to determine whether such contact is not permitted.

Second, contact with an adversary's former employee may result in the disqualification of a law firm, despite the fact that it is not an ethical violation. It is unclear what, if any, remedy an adversary would have if this contact was made by in-house counsel rather than outside counsel for the company. New York courts[6] have articulated the following test to determine whether contact with a former employee risks disqualification of counsel:

- Did the employee have the power to bind the corporation in litigation?
- Was the employee charged with carrying out the advice of the corporation's attorney?
- Should the employee be considered an organizational member possessing a stake in the representation?

If the answer to any of these questions is yes, then contact outside of the formal litigation process risks disqualification. The Court also cautioned that, while the fact that a former employee may have been privy to confidential or privileged information, that fact alone would not render informal contact inappropriate. However, even in such situation, counsel must be careful not to elicit any attorney-client or protected information from the former employee.

In one situation, a court found[7] that an informal interview of a litigation adversary's former employee was not proper when that adversary faced potential liability on a *respondeat superior* theory for that former employee's conduct. The contact was not permitted because the employee's answers potentially could bind the former employer in the litigation. Instead of an informal process, discovery from that former employee had to be taken through formal subpoena and deposition.

Endnotes

1. In New York, there is no distinction between in-house and outside counsel regarding the applicability of the attorney-client privilege so long as the in-house attorney is acting as the company's attorney. *See, e.g., Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, (N.Y. 1989) ("The [attorney-client] privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel."). In addition, "[t]his privilege . . . extends beyond corporate directors and officers and applies to lower-echelon corporate employees." *Niesig v. Team* I, 76 N.Y.2d 363, 371 (N.Y. 1990).
2. *See, e.g., Indergit v. Rite Aid Corp*., 2016 WL 6441566 (S.D.N.Y. 2016); *Bernard v. Brookfield Properties Corp*., No. 107211/08, 2012 WL 2502775, 2012 N.Y. Slip Op. 31654(U) (N.Y. Sup Ct. N.Y. Co. June 15, 2012) ("a corporation's attorney-client privilege extends to communications with its former employees regarding matters that took place within the scope of their employment").
3. 381 P.3d 1188, 1191-1194 (Wash. Sup. Ct. 2016).
4. *Niesig v. Team I*, 76 N.Y.2d 363 (1990).
5. New Jersey Rules of Professional Conduct, Rule 4.2.
6. *Muriel Siebert & Co. v. Intuit Inc*., 8 N.Y.3d 506, 511 (2007).
7. *Dixon-Gales v. Brooklyn Hosp. Ctr*., 35 Misc. 3d 676, 941 N.Y.S.2d 468, 2012 N.Y. Slip Op. 22063, 2012 WL 786854 (Sup. Ct. 2012).