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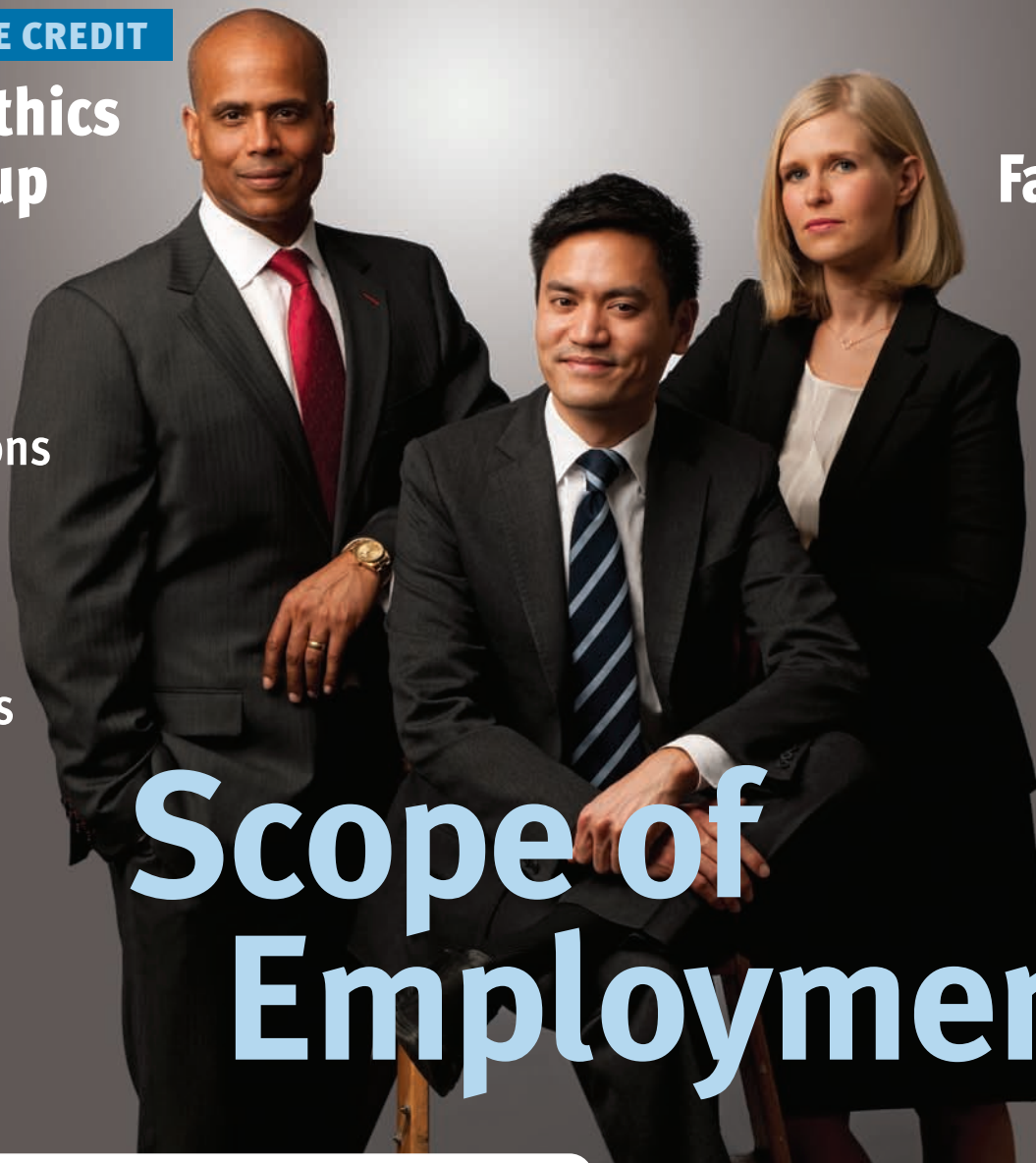

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Los Angeles lawyers Marcellus A. McRae, Antonio Raimundo, and Katherine V.A. Smith assess the factors that affect the confidentiality of communications with former employees
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SCOPE OF EMPLOYMENT

by MARCELLUS A. McRAE, KATHERINE V.A. SMITH, *and* ANTONIO RAIMUNDO

Attorneys seeking information from the former employees of clients must consider how laws and loyalties can conflict

ATTORNEYS PROSECUTING or defending lawsuits involving corporate entities often find themselves at a crossroads when a former employee has key information, but it is not known where that employee's allegiance lies. Under these circumstances, it can be difficult to assess how best to approach the employee witness, or (if the attorney represents the employer) how to protect conversations with the witness from disclosure. Plaintiff and defense counsel must navigate the uncertain waters surrounding a former employee first by answering the question of whether communications between the employer's counsel and the former employee are privileged or otherwise protected from disclosure. Second, attorneys on both sides of the "v" should apply several best practices when approaching, deposing, or defending a former employee.

Commentators often cite the Supreme Court opinion in *Upjohn Company v. United States*[1] as a leading authority regarding whether corporate counsel's communications with former employees are privileged or otherwise protected.[2] Ironically, the majority in *Upjohn* explicitly declined to address whether communications between *former* employees and a corporation's counsel are privileged.[3] Instead, the court restricted its analysis to the question of when discussions between a corporation's attorneys and its *current* employees will be privileged.[4] Articulating what is now known as the subject matter test, the court held that such communications are privileged if 1) the communications were made by a current employee to the corporation's counsel, acting as such, 2) the communications were made at the direction of corporate superiors for the purpose of securing legal advice from counsel, 3) the communications concerned matters within the scope of the employee's corporate duties, and 4) the employee was sufficiently aware that he or she was being questioned in order for the corporation to obtain legal advice from its counsel.[5]

While the *Upjohn* majority declined to comment on whether and when communications with former employees are privileged,

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Justice Warren Burger showed no such restraint. In his concurring opinion, Burger extended the majority's opinion: "Because of the great importance of the issue, in my view the Court should make clear now that, as a general rule, 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."[6] It is from this concurring opinion that a body of case law was born.

Numerous courts have followed Burger's lead and extended the privilege to postemployment communications. One of the most notable cases following Burger's concurrence is *Peralta v. Cendant Corporation*, in which a Connecticut district court explicitly applied the reasoning of *Upjohn* to communications with former employees, articulating the relevant test as:

> [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*. As to any communication between defendant's counsel and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness's testimony, consciously or unconsciously, no attorney-client privilege applies.[7]

Other courts have reached similar conclusions.[8] For example, in *Surles v. Air France*, the Southern District of New York ruled that communications with a 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."[9] In *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, the Eastern District of Pennsylvania ruled that "if the communication sought to be elicited relates to [a former employee's] conduct or knowledge during her employment…or if it concerns conversations with a corporate counsel that occurred during her employment, the communication is privileged."[10]

However, the protections articulated by these courts are not without limit. *Peralta* specifically cautioned that while communications between corporate counsel and a former employee about facts within the scope of employee's former job are protected from discovery, communications about postemployment matters—including the litigation itself—are not.[11]

Other courts have rejected Burger's approach and enforced the distinction between current and former employees. As a result, there is not a consistent rule across jurisdictions regarding the confidentiality of postemployment communications, as not all federal courts follow a *Peralta*-style rule. For example, in *Clark Equipment Company v. Lift Parts Manufacturing Company*, an Illinois district court explained:

> The reasoning of *Upjohn* does not support extension of the attorney-client privilege to cover post-employment communications with former employees of a corporate party. Former employees are not the client. They share no identity of interest in the outcome of the litigation.…It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit.[12]

Similarly, in *Infosystems, Inc. v. Ceridian Corporation,* a Michigan district court ruled that "communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witness."[13]

Nor do all states follow the same approoach that *Peralta* does. For example, at least one federal court has concluded that postemployment communications are not protected by the attorney-client privilege under California law. In *Connolly Data Systems, Inc. v. Victor Technologies, Inc.*, the U.S. District Court for the Southern District of California, applying California law, held that a former employee's communications with counsel were not privileged because 1) the former employee was not the "natural person to speak for the corporation," 2) the former employee was not required to speak to the corporation's attorney, and 3) the former employee was not the only person with the relevant knowledge.[14] It is worth noting, however, that no California court has expressly agreed or disagreed with *Connolly*'s assessment of California law.

But all hope is not lost for defense attorneys interviewing former employees in jurisdictions that decline to extend the privilege to postemployment communications—the attorney work product doctrine will sometimes offer protection where the attorney-client privilege does not. For example, while the district court in *Connolly* held that the attorney-client privilege would not shield postemployment communications under California law, the court went on to hold that the work product doctrine would protect such conversations where revealing their content "may tend to divulge the mental impressions, opinions, and theories" of the employer's attorney.[15] Nevertheless, not all courts permit work product protection in similar scenarios. In the *Clark Equipment* case, the Illinois district court concluded that postemployment communications with former employees were not protected by the attorney-client privilege *or* the work product doctrine because "[i]f counsel, in discussions with third parties [i.e., the former employees], reveals his mental impressions, etc. to such third parties, any claim of work product privilege is waived by such nonprivileged disclosure."[16]

Which Jurisdiction's Law Controls?

Given the variance in law across and even within jurisdictions, attorneys should carefully consider which law will govern before presuming that their conversations with former employees will be protected from disclosure. The *Restatement of Conflict of Laws* states that the law of the state with the "most significant relationship to the communication" should control.[17] Under the restatement, this will generally mean that the law of the state where the postemployment communication occurs will control.[18] However, if an attorney interviews a former employee in Florida about events that took place during the individual's employment in Michigan, in preparation for a deposition in a lawsuit pending in California, which state's law will control may be less than obvious. Accordingly, it is important to research and confer with local counsel regarding the attorney-client privilege law of each jurisdiction that may have a significant relationship to the postemployment communication and, when in doubt, assume the conversation will not be privileged.

The Pragmatic Plaintiff Counsel

For plaintiffs' attorneys, the former employees of a defendant are often unknown quantities. Will they be loyal to their former employer? Their coworkers? Did they experience what the client experienced? In deciphering this mystery, the most valuable resource is often the client, who can identify the former employees with valuable information, steer counsel to those who will be willing to help, and provide important information for deposing those who will not. Ideally, the client will help identify former employees who can buttress the client's story.

In meeting and working with former employees, there is some cooperation that is helpful and some that is not. Indeed, there are several exceptions to the general rule that counsel can interview former employees at counsel's pleasure and about anything. For example, the interviewing counsel does not want privileged information, even if the witness offers it.[19] Counsel also does not want electronic information taken from the employer without authorization; this could expose counsel and the former employee to criminal prosecution under the Computer

Fraud and Abuse Act,[20] among other liabilities. Finally, counsel does not want to violate ethical rules prohibiting solicitation and conflicts of interest.[21] Plaintiffs' attorneys should preface meetings with former employees by clearly stating the purpose of the meeting, securing an acknowledgment that the meeting is voluntary, and laying down ground rules about how the meeting will proceed. If possible, it is also prudent to have a witness to meetings with former employees who could competently testify about what transpired. If counsel does consider representing the former employee upon his or her request, careful consideration must be given to whether the individual's interests align with those of the current client.

Defense Counsel

For defense counsel, a former employee can be friend or foe (or, in some cases, a complete nonstarter). Generally, counsel should not court a negative witness unless absolutely necessary or without some indication he or she will switch sides. Neutral witnesses are always worth consideration, but the energy required to build and maintain a working relationship with them may not be worth the effort if they do not have unique and useful information.

A friendly former employee, on the other hand, can be incredibly valuable and fill several important and distinct roles. The friendly former employee can identify other witnesses and documents as well as testify to the lack of credibility of the plaintiff and the absence of plaintiff's complaints or claims before the lawsuit was filed. He or she can humanize the defendant's management and, in some cases, even be the face of the company. Most important, he or she can be a credibility booster, because he or she is not being paid by the employer. Thus, counsel are well advised to work closely with the defendant to identify potentially friendly former employees.

Moreover, when it comes to cooperating with former employees, a good defense starts with a strong offense. Employers should be proactive, encouraging a positive human resources department and corporate culture, conducting exit interviews, and maintaining good relationships with former employees. At the onset of litigation, an employer should consider reaching out to former employees to notify them of the litigation and reminding them to maintain the privilege of any conversations they had with counsel during their employment. It can only help the situation to have them first hear about the litigation from defense counsel rather than from plaintiff's counsel.

Defense counsel meeting with a former employee should exploit the natural advantage, i.e., easy access to the client's information and documents. With this access, there is no excuse to not come prepared with the former employee's position at the company, the dates of employment, any privileged communications that he or she had with counsel, and reasons for termination and terms on which the employment relationship terminated. There should also be some understanding of what the individual will know about the lawsuit and what documents he or she may have seen.

In the meeting, remind the former employee that communications he or she had with counsel during his or her employment remain privileged. Depending on the jurisdiction, it may be appropriate and advisable to inform the individual that the current communication is privileged and to ask that he or she keep the conversation confidential. While former employees should not be told not to speak with opposing counsel,[22] they may be told that they will likely be contacted by an attorney for the other side and that it is up to them whether or not to speak with that attorney. Counsel for the employer can also request (but not demand) to be present for any conversation that the former employee has with opposing counsel.[23] While discussing legal strategy or any facts that counsel has learned in litigation with the former employee may enhance the chance that a court would find the conversation to be privileged, it also risks the disclosure of confidential attorney work product.

Often, defense counsel's most extensive interaction with a former employee will be in preparation for deposition. If the former employee is willing to do so, it can be very useful to both the witness and the client to meet with the witness before his or her deposition. However, the value of these meetings may be significantly limited if they are not protected from disclosure by the attorney-client privilege or work product doctrine. Thus, it is extremely important to research the law in the applicable jurisdiction, as the law of privilege and attorney work product can vary greatly between states and courts.

Some attorneys attempt to circumvent this issue by representing the witness for the sole purpose of preparing for and defending his or her deposition. Assuming there is no conflict of interest, defense counsel generally may represent former employees at deposition. However, as an Illinois district court observed, outside counsel may "create an appearance of impropriety" by offering to represent a former employees free of charge, "because such an offer may encourage a former employee to seize on the opportunity of free representation without evaluating the advantages of independent counsel."[24] Thus, generally, counsel should not offer to represent the witness but instead may consider accepting the representation only if the witness first requests it.

However, even representing a former employee for the purposes of his or her deposition is not an absolute guarantee that predeposition communications will be entirely shielded. As one New York district court cautioned, this representation makes "no difference to the application of *Peralta*[;] [t]he mere volunteered representation by corporate counsel of a former employee should not be allowed to shield information which there is

no independent basis for including within the attorney-client privilege," such as discoverable facts and "matters that may have affected or changed the witness's testimony."[25] Therefore, defense counsel should use caution in disclosing any new facts to a former employee witness because the disclosure may be discoverable.

Because there is significant legal ambiguity as to whether communications between the employer's counsel and former employees are privileged, and because the allegiances of former employees are often unknown, communicating with, deposing, and defending the depositions of these witnesses can be a strategic minefield for plaintiff and defense counsel alike. However, regardless of on which side of the "v" the client's name appears, with careful thought and research, counsel can explore, neutralize, and perhaps even leverage the unknown quantity of a former employee. ■

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[1] Upjohn Co. v. United States, 449 U.S. 383 (1981).

[2] *See, e.g.,* JAMES F. ROGERS, ET AL., FORMER EMPLOYEES: LEGAL, PRACTICAL AND ETHICAL ISSUES 159-60 (2006) [hereinafter ROGERS]; EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 168 (5th ed. 2007) [hereinafter EPSTEIN].

[3] Upjohn, 449 U.S. at 394 n.3.

[4] *See id.* at 394-95. *See also* ROGERS, *supra* note 2, at 159.

[5] Upjohn, 449 U.S. at 394-95; EPSTEIN, *supra* note 2, at 143; ROGERS, *supra* note 2, at 159. Note that Illinois courts have refused to follow *Upjohn* and continue to enforce the "control group" test that the Supreme Court rejected in *Upjohn*. *See, e.g.*, Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 517-18 (N.D. Ill. 1990).

[6] Upjohn, 449 U.S. at 402-03 (Burger, J., concurring).

[7] Peralta v. Cendant Corp., 190 F.R.D. 38, 41-42 (D. Conn. 1999).

[8] *See, e.g.*, 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); In re Coordinated Pretrial Proceedings in Petroleum Prods Antitrust Litig., 658 F. 2d 1355, 1361 n.7 (9th Cir. 1981); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 41-42 (D. Mass. 1987); In re Allen, 106 F. 3d 582, 605-06 (4th Cir. 1997); ROGERS, *supra* note 2, at 159-60.

[9] Surles v. Air France, 2001 U.S. Dist. LEXIS 10048, at *17 (2001).

[10] United States ex rel. Hunt v. Merck-Medco Managed Care, LLC, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004).

[11] Peralta, 190 F.R.D. at 41-42; *see also* Pastura v. CVS Caremark, No. 1:11-cv-400, 2012 U.S. Dist. LEXIS 94084, at *6 (S.D. Ohio July 9, 2012) (While *Upjohn* applies to former employees, the privilege is limited to communications relating to information obtained during the course of employment and does not protect communications containing information that a former employee obtained after their employment ended.).

[12] Clark Equip. Co. v. Lift Parts Mfg. Co., 1985 U.S. Dist. LEXIS 15457, at *14 (N.D. Ill. Sept. 30, 1985).

[13] Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303, 306 (E.D. Mich. 2000). *But see id.* (recognizing certain exceptions to this rule). Note that the district court for the District of Connecticut declined to revisit its holding in *Peralta* in light of *Infosystems*, thereby reaffirming its decision in *Peralta*. *See* Weber v. FUJIFILM Med. Sys., U.S.A., No. 3:10 CV 401 (JBA), 2011 U.S. Dist. LEXIS 82340, at *26 (D. Conn. July 27, 2011).

[14] Connolly Data Sys., Inc. v. Victor Techs., Inc., 114 F.R.D. 89, 94 (S.D. Cal. 1987); *see also* Peralta, 190 F.R.D. at 40 (discussing *Connolly*); Allen, 106 F. 3d at 606 n.14 (citing *Connolly* as a case that "denied the privilege to communications between the client's attorney and former employees").

[15] Connolly Data Sys., 114 F.R.D. at 96; *see also* Peralta, 190 F.R.D. at 42.

[16] Clark Equip. Co. v. Lift Parts Mfg. Co., 1985 U.S. Dist. LEXIS 15457, at *15 (N.D. Ill. Sept. 30, 1985).

[17] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §139 (1971).

[18] *See id.* §139(2) and cmt. e.

[19] Smith v. Kalamazoo Ophthalmology, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004) ("Attorneys also have a responsibility to refrain from inquiring into areas that may be subject to the attorney-client privilege or the work product doctrine.").

[20] 18 U.S.C. §1030.

[21] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, 7.3.

[22] MODEL RULES OF PROF'L CONDUCT R. 3.4(f).

[23] *See* Fischbach v. Founders Court, Inc., Nos. 2:94CV00765, 2:95CV00211, 1996 U.S. Dist. LEXIS 8256, at *4 (M.D. N.C. May 16, 1996) (a request to be present during conversations with opposing counsel is generally permissible); State v. Hofstetter, 878 P. 2d 474, 480-82 (Wash. Ct. App. 1994) (an instruction is not).

[24] Aspgren v. Montgomery Ward & Co., No. 82 C 7277, 1984 U.S. Dist. LEXIS 21892, at *10-13 (N.D. Ill. Nov. 19, 1984).

[25] Wade Williams Distrib., Inc. v. ABC, No. 00 Civ. 5002 (LMM), 2004 U.S. Dist. LEXIS 12152, at *4-5 (S.D. N.Y. June 30, 2004).