Ex Parte Communications with Former Employees: How to Protect Your Corporate Client

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Imagine you represent a corporation in a negligence action. Unbeknownst to you, the Plaintiff's attorney has located a former employee of your client who has factual information important to your case. Without contacting you, Plaintiff's attorney meets with this witness, learns some crucial information and gains a decided advantage in the litigation as a result. Astonished that Plaintiff's attorney communicated with your client's former employee *ex parte*, you search the Maryland Rules of Professional Conduct and case law to see what recourse you have. Does a plaintiff's attorney really have unfettered access to your client's former employees?

According to the Maryland Rule of Professional Conduct (MRPC), an organization may assert privilege over *current* employees in two situations:

1. employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter and possess privileged information; or

2. employees whose acts or omissions in the matter may bind the organization for civil or criminal liability.

See MRPC 4.2(b).

The above rule, however, does not address communications with *former* employees. Comment Six of MRPC 4.2 specifically refers the reader seeking information about communications with former employees to MRPC 4.4(b), which simply addresses communications with "third persons." However MRPC 4.4(b) merely prohibits a lawyer from seeking information "relating to the matter that the lawyer knows or should know is protected from disclosure by statute or established evidentiary privilege." *Id.*

In practice, applying MRPC 4.2 and 4.4 (the "Rules") to communications with former employees has proven difficult as the Rules do not explain what types of communications with former employees are "privileged." To further complicate the matter, Maryland's appellate courts have not addressed the issue[i] and Maryland's federal district court has provided only limited direction in this area,[ii] leaving litigants unsure as to whether *ex parte* communication with former employees is ethically permissible.

In Spring 2003, an article was published in *The Defense Line* discussing the same Rules and noting conflicting decisions issued by several of the judges of the United States District Court for the District of Maryland.[iii] The authors pointed out that the earlier decisions turned on how "extensively exposed" the former employee was to the organization's confidential information, where later decisions applied a "strict interpretation of the language" to permit blanket *ex parte* communications with former employees.[iv] One federal judge, asked by the Plaintiff's attorney for permission to communicate *ex parte* with the corporate defendant's former employee, refused to issue an advisory opinion.[v] The article ended with a discussion of the changes to Rules 4.2 and 4.4, and posed an open question regarding the implications these amendments may have on State and Federal court decisions regarding *ex parte* communications with former employees.[vi]

In the years since thee article was written, Maryland's federal district court judges have attempted to "clear up" the recognized conflict in the past decisions. In 2012, Judge Schultz stated, "[C]ourts in this District have consistently prohibited *ex parte* communications with former employees who have protected information, but have held that contact with former employees who do not have protected information does not violate the Rule.[vii]

Last year, Judge Gallagher of Maryland's federal district court revisited the issue in *Hanlin-Cooney v. Frederick Cnty., Md.*[viii] In that case, the plaintiff's attorney communicated *ex parte* with the defendant's former employee (a former corrections officer).[ix] The witness divulged his personal experiences while employed by the defendant, including his knowledge of duties that corrections officers perform, his employment status, and the condition of the medical units.[x]

The court held the *ex parte* contact with the defendant's former employee did not violate Rule 4.4(b).[xi] In so holding, Judge Gallagher conducted an analysis under both the earlier "extensively exposed" test and the later "plain language" test.[xii] Ultimately, the court found the *ex parte* communication did not run afoul of the Rules of Professional Conduct, as the former corrections officer was not privy to information protected by attorney-client privilege and was thus not extensively exposed to confidential information.[xiii]

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[i] *See Chang-Williams v. United States*, No. CIV. DKC 10-783, 2012 WL 253440, at *3 (D. Md. Jan. 25, 2012) (explaining that Maryland Courts have not addressed the application of Rule 4.2 to *ex parte* communications with former employees).

[ii] *See Larry R. Seegull & Jill S. Distler*, *Ex Parte Communications with Former Employees Under the Maryland Rules of Professional Conduct*, *THE DEFENSE LINE*, Spring 2003, at 1, 3-5 (discussing conflicting opinions in United States District Court for the District of Maryland).

[iii] *Seegull*, *supra* note ii.

[iv] *Seegull*, *supra* note ii at 1, 3.

[v] *Seegull*, *supra* note ii at 5. *See also Rogosin v. Mayor & City Council of Baltimore*, 164 F. Supp. 2d 684, 685 (D. Md. 2001).

[vi] *Seegull*, *supra* note ii at 5.

[vii] *Chang-Williams*, No. CIV. DKC 10-783, 2012 WL 253440, at *4.

[viii] No. CIV. WDQ-13-1731, 2014 WL 3421921 (D. Md. July 9, 2014).

[ix] *Id.* at 1.

[x] *Id.* at 10.

[xi] *Id.* at 8-10.

[xii] *Id.* (discussing the 4.4(b) test and the 4.2 test).

[xiii] *Id.*

(EX PARTE) *Continued from page 11*

So what can a corporate defendant do to protect itself? Where former employees are involved, here are a few thoughts which may help you protect your client:

• Talk to former employees

Reach out to any former employees who may have important knowledge regarding the case. Explain to them your role in the case and remind them that any privileged communications they had with the corporation's lawyers should not be revealed to anyone. You may also explain the potential repercussions they face if they discuss the case with the plaintiff's lawyer. If the facts warrant it, you may want to advise the former employees to secure legal counsel of their own.[xiv] This advice may alert the former employees not to speak to opposing counsel *ex parte*. If the threat of litigation looms prior to an employee's departure, you may want to advise your client to explain to the employee the need to maintain established confidences during an exit interview.

Be aware that you will likely not be able to assert attorney-client privilege or work product with a former employee in a subsequent deposition or trial. Do not discuss with the former employee what you have learned about the case from your client, witnesses, etc., as this information may be discoverable.

If the employee has already met with the plaintiff's attorney, be sure to find out what was discussed. Just as your discussions with the witness may not be privileged, neither are your opponent's conversations.

• Identify any statutory privilege you may assert over former employees

Information possessed by former employees who do not communicate with the corporation's lawyers may be protected from disclosure by statute. Be sure to check for any statutory or regulatory provisions that may apply.

For example, HIPAA prohibits disclosure of private health information without consent of the patient.[xv] Even if your opposing counsel represents the patient, HIPAA regulations require the patient's authorization specify which healthcare providers are authorized to disclose information in their possession.[xvi] A health care provider is not authorized to access a patient's chart in the possession of the hospital or practice that no longer employs them.

Other statutory privileges include the medical review committee privilege,[xvii] patient-therapist privilege,[xviii] accountant-client privilege,[xix] patient-professional counselor privilege,[xx] patient-psychiatric nursing specialist privilege, news media privilege,[xxi] and social worker-client privilege.[xxii] If any of these are implicated in your case, be sure to invoke them with the plaintiff's attorney and affirm that they may apply to the former employee.

• Caution plaintiff's counsel against discussing privileged information with former employees

If you suspect that plaintiff's counsel might contact former employees who have privileged information, contact the plaintiff's attorney early on and caution that he/she should not attempt to discuss confidential matters with the witnesses. The implication of running afoul of attorney-client confidentiality may dissuade your opponent from seeking *ex parte* interviews. While there may be no legal means to prevent discovery from a former employee, being proactive may limit the exposure to your client. Spot the critical people early on in the litigation process, and determine if you can ethically assert that they may possess privileged information.

• Can a former employee's statements be used against your client?

If plaintiff's counsel has already contacted your client's former employee *ex parte* can their statement be used against your client?

Apart from information protected by attorney-client or statutory privilege, there is no prohibition on disclosure from the former employee to opposing counsel. However, there may be ways to mitigate damaging testimony that you may confront at trial. Is the information hearsay? Are there other facts contradicting the former employee's statements? Did he/she leave the employ of your client under circumstances that might give a motive to fabricate or exaggerate the facts? A thorough investigation of the former employee may provide a means to defend against otherwise damaging disclosures.

• Last words: when dealing with former employees, it is always better to be cautious!

In light of the language of the Rules and the federal court's interpretation, safe practice should assume the Maryland Rules of Professional Conduct do *not* prohibit a plaintiff's attorney from speaking to a former employee *ex parte*. While you may not have the ability to preclude such communications, observing the advice above may limit your client's exposure.

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[xiv] Because former employees are typically unrepresented third parties, you should be wary of giving any legal advice other than to secure counsel. *See* MRPC 4.3.

[xv] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (codified as amended in scattered sections 18, 29, 42 of the U.S.C.)

[xvi] *Id.*

[xvii] Md. Code, Health Occ. § 1-401 (2014); *see also St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assoc., P.A.*, 896 A.2d 304 (2006) (held e-mails, letters, correspondences and testimony of hospital staff to hospital's medical review committee were privileged from discovery pursuant to the medical review committee privilege).

[xviii] Md. Code, Cts. & Jud. Proc. § 9-109 (2014).

[xix] Md. Code, Cts. & Jud. Proc. § 9-110 (2014).

[xx] Md. Code, Cts. & Jud. Proc. § 9-109 (2014); *see also Butler-Tulio v. Scroggins*, 774 A.2d 1209, 1216 (2001) (recognized a narrow exception to the general rule that there is no physician-patient privilege in Maryland in the mental health area).

[xxi] Md. Code Ann., Cts. & Jud. Proc. § 9-112 (2014).

[xxii] Md. Code Ann., Cts. & Jud. Proc. § 9-121 (2014).