Corporate Alzheimer's: Dealing With The Loss Of Institutional Knowledge

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The Problem Scenario

You represent XYZ Corporation in a business dispute with ABC, Inc. The events underlying the dispute occurred from 1993 to 2005. XYZ's principal office in the US was formerly in New York, but since 1998 has been in Dallas, Texas. Wiley K. Oatey was the former V.P. of your client and has the most knowledge of the events and transactions in question, negotiated the contract in dispute, and furnished the information to ABC that formed a basis for their entering into the transaction.

In 2004, it was taken over by QT, LLC, a Delaware LLC owned by a British corporation. QT's owners decide that Oatey's position can be handled by one of its executives in London. QT directs that XYZ eliminate Oatey's job as part of XYZ's "reorganization." It does and he is severed

after 33 years with XYZ, and given an early retirement package of compensation and health and pension benefits. No one interviewed Oatey about the relevant events and transactions before he was dismissed or before you undertake to represent XYZ when it is sued for breach of contract.

Oatey's deposition is noticed by your opponent.

When you contact Oatey to discuss the case and to meet with you to prepare for the deposition, he refuses to talk to you, other than to note that he remains unemployed, has been unable to find comparable work because he is 63, has been" retired" for 19 months, and that he harbors a deep and abiding dislike for XYZ.

How do you address this problem? Avoid it in the future?

I. Pre-Litigation Planning

A. Identify potential disputes in which he is a key player

In the unfortunate, but not uncommon scenario described above, XYZ's corporate counsel is left with a bitter and angry ex-employee as the key witness in its case. Preventing this scenario in the first place is the most obvious solution to this problem. In larger organizations, corporate counsel may need to be advised of planned reorganizations, especially if litigation is pending. In smaller organizations, without corporate counsel, management that handles personnel decisions should be advised to consider any pending litigation prior to terminations or reorganizations. The potential cost of losing a critical witness in pending litigation must be considered, along with all the other obvious business factors, in deciding to terminate an employee.

B. Undertake to obtain a continuing commitment to cooperate by contract

In the absence of a contract that may alter the basic rule, a former employee will not owe his former employer any duty to cooperate in ongoing litigation. *See e.g. V.I.M. Recyclers, L.P. v. Magner*, 271 F.Supp.2d 1072 (N.D.Ill. 2003) ("It is well-settled. . .that an employee owes a duty of fidelity and loyalty to his employer. This duty ends, however, once the employment relationship ends.")

In the best case scenario, counsel for XYZ would have an opportunity to encourage Oatey to cooperate with the ongoing litigation prior to his termination. For some key personnel, a cooperation clause or allegiance clause might be included in their offer letter. Alternatively, in the face of the scenario above, XYZ might have asked Oatey to sign a cooperation agreement once it became apparent that he was the sole employee with knowledge necessary to pending litigation. Finally, XYZ might have considered including a clause in Oatey's severance agreement to ensure Oatey's future cooperation.

C. What does a sample contract provision look like?

Employee agrees to fully cooperate with and assist the Company and their counsel in connection with any litigation, corporate transactions, general business matters, or agency investigations or audits, and to make himself reasonably available to the Company to do so at times and locations as to not interfere with his duties and responsibilities to any future employer. In consideration therefore, Employee will be reimbursed for reasonable and customary expenses, loss of income, and loss of the benefits of retirement incurred in complying with this paragraph 6 according to the Company's then-current reimbursement policies. Employee agrees that he will not

voluntarily cooperate in litigation, regulatory or administrative proceedings or investigations against the Company, nor will he act in any manner disloyal to the Company or contrary to its interests as determined by the Company, provided that this restriction will not prevent Employee from (a) engaging in competition with the Company; (b) after notification to the Company, providing factual information to a federal regulator which would be subject to subpoena; and (c) testifying truthfully under subpoena in any legal proceeding.

D. Are such provisions enforceable after he leaves employment?

At this time, no reported case has directly examined the enforceability of a clause to require a former employee to cooperate in pending litigation. In a few instances, however, such a cooperation clause has been mentioned and treated as enforceable without any analysis by the court. *See Arts4All Ltd. v. Hancock*, 25 A.D.3d 453 (N.Y. 2006); *Union Pacific R. Co. v. Mower*, 219 F.3d 1069 (9th Cir. 2000); *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d 173 (2nd Cir. 1999); *General Cinema Beverages of, Miami, Inc. v. Mortimer*, 689 So.2d 276 (FL App. 1995). *See also* Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 Neb. L. Rev. 868 (2003) (treating cooperation clauses as enforceable, but raising questions about ethics and adequate consideration in such agreements).

Like any other enforceable severance agreement, a cooperation clause must be the product of an offer and acceptance and be supported by valid consideration. Elaine Marie Tomko, Annotation, *Liability for breach of employment severance agreement*, 27 A.L.R.5th 1 § 3 (2005). As in the sample provision above, the consideration offered is likely to be severance pay or consulting fees. In the context of ordinary severance agreements, such payments are generally ample consideration. Likewise, an employer will need to support a cooperation clause with consideration, but also consider that the former employee may serve as a witness in the pending litigation. Most jurisdictions allow opposing counsel to scrutinize the payments of witnesses and testimony regarding these fees is often elicited as impeachment testimony. *See e.g. O'Hara v. Cincinnati St. Ry. Co.*, 68 Ohio App. 7 (1941). Therefore, an employer will need to balance the requirement for adequate consideration against the likelihood that payments such as "consulting fees" may be presented as evidence of bias or impartiality.

II. Litigation Issues

A. Can you represent him at his deposition? If so, who pays?

Where the former employee has an identifiable interest in the litigation, dual representation is proper unless a conflict of interest requires separate representation. *See* Model Rules of Prof'l Conduct R. 1.7. However, even when the former employee does not, some courts have found that an attorney is not disqualified from representing both the corporation and the former employee. In *In re Coordinated Pretrial Proceedings*, defense counsel was disqualified from representing a former employee of the defendant in connection with discovery depositions. 658 F.2d at 1356.Th trial court reasoned that such representation would limit informal interviews, and that defense counsel would be prone to interject on behalf of the defendant rather than the employee. *Id.* at 1359. On appeal, the Ninth Circuit vacated the district court's order ("…mere inconvenience and frustration do not warrant interference with the right to counsel.") and ruled that sanctions could remedy any inappropriate objections. *Id.* at 1361.

United States v. Occidental Chemical Corporation, 606 F. Supp. 1470 (W.D.N.Y. 1985) reached a similar conclusion. There, the plaintiff argued that because the former employee might give testimony adverse to the corporation, the defense counsel's ability to give independent advice to the witness client was limited. *Id.* at 1474. The court rejected this argument, and stressed that the employee was not a defendant and could not be subjected to liability. The court found that the employee's only real interest during discovery was "to be protected from unwarranted inquiries and to be able to consult with counsel during questioning when doubts arise." *Id.* Accordingly, there was no conflict of interest. *Id.*; *see also D.S. Magazines, Inc. v. Warner Publisher Servs., Inc.*, 623 F. Supp. 624, 625 (S.D.N.Y.1985) (allowing attorney to represent a former employee of the defendant because there was virtually no chance that the parties would become adverse).

Interestingly, at least one court has allowed a plaintiff's lawyer to represent a defendant's former employee at a deposition. In *First Sec. Bank, N.A. v. Northwest Airlines, Inc.*, 170 F.R.D. 1 (D. Mass. 1996). The defendant's counsel argued plaintiff's counsel had a conflict of interest and attorney-client communications could be disclosed by the former employee to the plaintiff's lawyer. *Id.* at 2. The court dismissed both arguments, and held there was no evidence of a conflict between plaintiff and defendant's former employee. *Id.* The former employee had voluntarily agreed to testify for plaintiff, and both plaintiff and the former employee had agreed in writing to the dual representation after full disclosure. *Id.* The court reasoned that because an attorney may

interview an opposing party's former employee, in the absence of a conflict of interest, there was no ethical bar in allowing plaintiff's counsel to represent the defendant's former employee. *Id*

B. What other deposition issues arise?

The deposition of a former employee cannot be taken merely on notice to the corporation. *See, e.g., Pettyjohn v. Goodyear Tire and Rubber Co.*, 1992 WL 168085, at *1 (E.D. Pa. July 9, 1992) (finding that notice of depositions of former employees sent to corporation was inadequate, and that former employees must be subpoenaed). This is the prevailing and more persuasive view, though there is contrary authority when the former employee continues to act as the managing agent of a corporation despite the lack of formal ties. *See Smith v. Shoe Show of Rocky Mount, Inc.*, 2001 WL 1757184, at *2 (D. Mass. April 26, 2001) (requiring production of witness who "remains a managing agent to the present time" and whose "present management responsibilities" gave him power to exercise judgment and discretion over corporation's affairs); *Independent Prods. Corp. v. Loew's, Inc.*, 24 F.R.D. 19, 23-24, 26 (S.D.N.Y.1959) (requiring production of witnesses who had resigned their positions to avoid depositions in case but who "are in a very real sense now in the 'employ' of the plaintiffs although formal ties are broken"); *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1453 (D.C. Cir.1986) (district court properly required Church of Scientology to produce its founder, L. Ron Hubbard, as a managing agent because Hubbard still exercised "ultimate control" over church despite his resignation from his formal position).

Because the corporation usually has no contractual power over the former employee, the corporation rarely faces sanctions for not producing the former employee. In some cases, the former employee will appear voluntarily. If the adversary is unable to subpoena a recalcitrant former employee, the court may exercise its discretion to bar the former employee from testifying for the corporation at trial.

If the corporation's lawyer does not represent the former employee, he cannot instruct him not to answer questions at his deposition. But the inability to instruct does not render the corporation's counsel helpless in the face of objectionable questions. Where communications are privileged, the corporation's lawyer will be justified in restricting the former employee's deposition. In *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455 (N.D. Cal. 1978), a former president of a company was asked questions at his deposition concerning a conversation he had had with the company's inside counsel during his employment. *Id.* at 457. At the deposition, both the lawyer for the company and the witness's personal lawyer objected on the basis of the company s attorney client privilege. *Id.*

On the advice of the personal lawyer, the former employee answered the questions after the objections were made. *Id.* The company lawyer did not give advice on whether he should answer. *Id.* at 461. The court held that the company's lawyer waived the attorney-client privilege by failing to take further action to prevent the former president from answering the objectionable questions, and noted that the proper tactic would have been for the company's lawyer to have adjourned the deposition and to have applied for a protective order under FRCP. 30(d). *Id*. at 460-461. Such a view offers only a rather disruptive alternative. Better advice is to have the opposing lawyers agree on the record that the company can seek a protective order after the examining lawyer has deposed the former employee on the unprivileged matters.

Under Federal Rule of Civil Procedure 32(a)(2), the deposition of a party or of anyone who is an officer, director, or managing agent may be used by an adverse party for any purpose. Similar rules have been enacted in many states. *See* Del. Super. R.C.P. 32(a)(2). This rule says nothing about former employees. If a former managerial employee's deposition is seen as that of an ordinary witness, then the deposition could be admitted only where the former employee was unavailable for trial under the usual criteria. *See* Fed. R. Civ. P. 32(a)(3).

If a former managerial employee is sufficiently identified with the corporate party to come within the corporation's attorney-client privilege, maybe be his deposition be used as a party admission? No case law can be found. An argument can be made for its admissibility if the former executive conferred before the deposition with the corporation's attorney based upon the protection of the corporate privilege.

The rules of evidence with regard to party admissions may also provide a basis. F.R.E. 801(d)(2) excludes from the hearsay rule "a statement by a person authorized by the party to make a statement concerning the subject." The deposition of a former executive who has been prepared in confidence by the corporation's lawyer arguably may fit this exception. Evidence that the former executive is hostile or otherwise adverse to the corporation may rebut the argument that the corporation authorized his deposition testimony.

F.R.E. 611(c) authorizes cross-examination by leading questions for witnesses "identified with an adverse party." Former managerial employees, and probably former non-managerial employees as well, meet this standard. *E.g.*, F.R.E. 611(c), Advisory Committee's Note, *Lowry v. Black Hill's Agencv*, 509 F.2d 1311, 1314-1315 (8th Cir. 1975) (allowing cross examination of employee who had been terminated at time of trial); *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F. 2d 958, 969-971 (5th Cir. 1969); 3 J. Weinstein & M. Berger, Weinstein's Evidence § 611(05] (1982).

Significantly, "Rule 611(c) provides trial judges with broad latitude in monitoring the manner in which testimony is extracted from witnesses, and reversal is warranted on the basis of leading questions only if the judge's actions cause the denial of a fair trial." *Winant v. Bostic*, 5 F.3d 767, 773 (4th Cir.1993).

C. Can your adversary have *ex parte* communications with him?

Yes. See III, A infra.

D. Are your communications with him protected by the attorney client privilege?

Application of the Attorney- Client Privilege

Most jurisdictions have applied apply the corporate attorney-client privilege to confidential communications with former employees *See, e.g.*, *Better Government Bureau Inc. v. Willis (In re Allen)*, 106 F.3d 582 (4th Cir. 1997), *cert. denied*, 522 U.S. 1047, 118 S.Ct. 689, 139 L.Ed.2d 635 (1998); *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 658 F.2d 1355, 1361 n. 7 (9th Cir. 1981) (The *Upjohn* "rationale applies to the ex-employees . . . involved in this case. Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client . . ."), *cert. denied*, 455 U.S. 990, 102 S.Ct. 1615, 71 L.Ed.2d 850 (1982); *Admiral Ins. Co. v. United States Dist. Ct. for Dist. of Arizona*, 881 F.2d 1486, 1493 (9th Cir.1989) (relying on *Coordinated Pretrial Proceedings*); *Cool v. BorgWarner Diversified Transmission Products, Inc.*, 2003 WL 23009017, at *2 (S.D. Ind. Oct. 29, 2003) ("We hold that when, as here, such information is communicated by the former employee to the corporation's counsel, those communications are protected by the attorney-client privilege."); *Bank of New York v. Meridien Biao Bank Tanzania Ltd*., 1996 WL 490710, at *3 (S.D.N.Y. Aug. 27, 1996) ("[T]he weight of authority is that the privilege applies to communications between counsel and former employees of a corporate client. . . . If an employee has information obtained while acting as representative of the corporate entity, it would frustrate the purposes of the attorney-client privilege if counsel for the corporation were foreclosed from having confidential communications with that individual at the instant the employment relationship terminated."); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont.1986) (*Upjohn* indicates that "the attorney-client privilege may extend to [defendant's] former employees . . . [with regard to their communications with] the company's counsel."); *Amarin Plastics v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D. Mass.1987) ("In some circumstances, the communications

between a former employee and a corporate party's counsel may be privileged.”).

As the holder of the privilege, the corporation may then prevent the former employee from disclosing any privileged communications. *See, e.g., In re Richard Roe, Inc.*, 168 F.3d 69, 72 (2d Cir. 1999) (“This privilege therefore belongs not to the former employee but to the corporation*, see United States v. International Bhd. of Teamsters*, 119 F.3d 210, 215 (2d Cir.1997), and John Doe, Inc. has thus asserted a valid claim to the privilege.”); *Roe v. United States* (*In re Grand Jury Subpoenas*), 144 F.3d 653, 658 (10th Cir. 1998) (“Any privilege resulting from communications between corporate officers and corporate attorneys concerning matters within the scope of the corporation's affairs and the officer's duties belongs to the corporation and not to the officer.”), *cert. denied sub nom.*, *Anderson v. United States*, 525 U.S. 966 (1998); *Terra Intern., Inc. v. Mississippi Chemical Corp.*, 913 F. Supp. 1306 (N.D. Iowa 1996) (finding that attorney could not inquire into privileged communications between former employee and corporate counsel because privilege belonged to corporation); *Sequa Corp. v. Lititech, Inc.*, 807 F. Supp. 653, 668 (D. Colo. 1992) (“Any privilege existing between the former employee and the organization's counsel belongs to the organization, and can be waived only by the organization.”); *Dubois v. Gradco Systems, Inc.*, 136 F.R.D. 341, 347 (D. Conn. 1991) (“[T]he privilege does not belong to, and is not for the benefit of, the former employee; rather, it belongs to, and is for the benefit of, [the corporation].”); *In re Home Shopping Network, Inc. Securities Litig.*, 1989 WL 201085, at *1 (M.D. Fla. June 22, 1989) (“The attorney/client privilege belongs to HSN and may not be waived by the employee.

Former employees of HSN are prohibited from discussing any attorney/client communications belonging to HSN.”). And any unauthorized disclosures by former employees are not admissible at trial. *See, e.g.*, Del. R. Evid. 502(b) (“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . .”); Calif.. Evidence Code § 954 (“Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . .”).

E. Are your memoranda of communications with him protected by the attorney work product privilege?

Yes, but subject to disclosure upon a showing of substantial need and inability to obtain the substantial equivalent by other means.

F.R.C.P. 26(b)(3). At lease one court has ordered production as a sanction for violating the disclosure requirements of R.P.C. 4.2 and 4.3. *Monsanto* Co. *v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013 (Del. Super. Ct. 1990).

III. Ethical Issues

A. Are there any constraints on you under the RPC in conducting an *ex parte* interview of him?

Model Rule of Professional Conduct 4.2 prohibits ex parte contact with "a person the lawyer knows to represented by another lawyer in the matter." If your client is adverse to an organization that is represented by counsel, is a current employee of that organization also deemed to be represented by that same lawyer? There are several views on this matter. The "permissive view" of rule 4.2 prohibits opposing counsel from communicating only with employees in the corporation's "control group" - i.e., the most senior corporate managers - without the corporate attorney's consent. This view holds that only the employees with the power to control the corporation may properly be equated with the corporation. Under the "intermediate view," interpreted through Comment [4] to Rule 4.2, an employee with the power to bind the corporation or make "admissions," or whose acts or omissions can be imputed to the organization, is included in the definition of "person." Although many states have adopted Comment [4], there has been no general consensus to its meaning.

In February of 2002, the ABA's House of Delegates adopted a series of changes to the existing Model Rules. These changes included revisions in Rule 4.2 and notably, in its comments, including Comment [4]. The revised Comment [4](now Comment [7]) to Rule 4.2 prohibits communication only with:

> a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

The revised Comment pointedly deleted the existing language barring contact with persons "whose statement may constitute an admission on the part of the organization" and made other limiting changes. Most jurisdictions are currently reviewing the ABA's 2002 changes to the Model Rules and Comments, and several have either adopted or proposed changes identical to or substantially the same as those in the new Comment [7].

Under the "Alter Ego" or "Managing/Speaking Agent" Test, contact is allowed with anyone except with those who have the legal power to bind the corporation in the matter and/or those who are so closely identified with the interests of the corporation as to be indistinguishable from it, those who are responsible for implementing the advice of the corporation's lawyer, or any member of the corporation whose own interests are directly at stake in the litigation. This is the position adopted by the Restatement, as well as numerous courts.

Other courts have declined to create or apply any general rule defining the categories of employees who may be contacted, instead applying a case-by-case, fact-specific balancing test in which the plaintiff's need to gather information informally is balanced against the defendant's need for effective representation. Results of this test generally favor broad access to witnesses for plaintiff counsel.

A minority of courts have barred attorneys from interviewing current employees of a corporate defendant without consent of opposing counsel whenever the interview concerns matters within the scope of the employee's employment. This view reflects the structure of Federal Rule of Evidence 801(d)(2)(D), which permits admission into evidence against a corporation of its employee's out-of-court statements that concern matters within the scope of the employee's employment.

There are also ethical constraints on talking to former employees of a corporate opposing party. Under the "permissive view," counsel may conduct ex parte interviews of the former employees of an adverse corporate party under Rule 4.2. The theory behind this view is that the language of the rule does not cover former employees and no current attorney-client relationship exists. This view has been expressly endorsed in Comment [7] of the 2002 amendments to the ABA Model Rules. Several jurisdictions have adopted or proposed changes to their rules and/or comments that are identical or substantially similar to this aspect of Comment [7].

An "intermediate view" asserts that counsel may conduct ex parte interviews of former employees unless the person's act or omission may be imputed to the corporation, or in instances where the former employee has an ongoing agency or fiduciary relationship with the corporation.

Although in most cases, contact is generally allowed with former employees of an organization, much like current employees, this communication would still be subject to attorney-client privilege. An argument could also be made that this communication would also be subject to other legal rights of the organization such as the work-product doctrine and trade secrets.

As noted above, the states have not taken an uniform approach with respect to the application of Rule 4.2 in contact with both present and former employees. Attached an Exhibit A is a chart which provides, on a state by state basis, how each state has interpreted Rule 4.2 with respect to both present and former employees of a corporation.

Some courts have taken an expansive view of what is required by Rules 4.2 and 4.3 when a party attempts to interview the former employees of another party. According to Rule 4.2 of the Delaware Lawyers' Rules of Professional Conduct, which track the Model Rules of Professional Conduct, when representing a client, "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Del. Prof. Cond. R. 4.2. "This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates." Del. Prof. Cond. R. 4.2 cmt. 2. "The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed." Del. Prof. Cond. R. 4.2 cmt. 8. However, the representation may be inferred from the circumstances, and a lawyer may not ignore such circumstances. *Id.* "Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." *Id.*

If a person with whom a lawyer communicates is not known to be represented by counsel, Rule 4.3 governs the communication. Del. Prof. Cond. R. 4.2 cmt. 9. Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Del. Prof. Cond. R. 4.3. As a general matter, Rule 5.3(c) and Rule 8.4(a) provide for vicarious liability by a lawyer for the conduct of others that violates the Rules of Professional Conduct. *See* David B. Isbell and Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the*

Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct, 8 Georgetown Journal of Legal Ethics 811-812 (1995). Under Rule 5.3(c)(1), a lawyer is responsible for the conduct of another if the lawyer either orders or ratifies the conduct. Similarly, Rule 8.4(a) prohibits a lawyer from assisting another or inducing another to violate the Rules of Professional Conduct, or for the lawyer to violate the Rules through the acts of another. Accordingly, a lawyer may not order another to engage in conduct the lawyer is barred from doing.

The Delaware Superior Court has addressed the applicability of both Rule 4.2 and 4.3 to communications made by investigators. In *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013 (Del. Super. Ct. 1990), *vacated in part on other grounds*, 1990 WL 200471 (Del. Super. Ct. Dec 04, 1990), on a motion for a protective order, Monsanto alleged that the defendants investigators violated Rules 4.2 and 4.3 when they interviewed Monsanto's former employees. The evidence submitted to the court indicated that the defendants' investigators did not ask whether the former employees were represented by counsel and failed to tell the former employees that they represented the defendants. *Id.* at 1016, 1020. The defendants argued that the Delaware Lawyers' Rules of Professional Conduct did not require the investigators to make such disclosures prior to the communications. *Id.* at 1016. Some investigators even misrepresented who they were. *Id.* at 1020. Rejecting the Defendant's argument that such conduct is not prohibited, the Court found:

> [W]hen the investigators did not determine if former employees were represented by counsel, when the investigators did not clearly identify themselves as working for attorneys who were representing a client which was involved in litigation against their former employer, when investigators did not clearly state the purpose of the interview and where affirmative misrepresentations regarding these matters were made, Rule 4.2 and Rule 4.3 were violated.

Id. at 1020. The court's conclusion in *Monsanto* that Rule 4.2 was violated is somewhat curious because earlier in the opinion the court found that Rule 4.2 did not prohibit contacts with former employees of a party. *See id.* at 1016. However, that portion of the court's opinion was based on Rule 4.2 prohibiting contacts with a represented "party." The current version of Rule 4.2 deals with a represented "person." Accordingly, it is conceivable that an attorney has duties to a represented "person" if the attorney, or the attorney's agent, know the "person" is represented by counsel. Moreover, such an interpretation is consistent with ABA Formal Op. 95-396, which directly addressed the issue. According to the relevant

portion of the opinion, “the Rule's coverage should extend to any represented person who has an interest in the matter to be discussed, who is represented with respect to that interest, and who is sought to be communicated with by a lawyer representing another party.” ABA Formal Op. 95-396.

Additionally, the court in *Monsanto* failed to set forth how Rule 4.2 requires investigators to inquire if an interviewee is represented by counsel. It is possible the court was considering Comment 8’s prohibition on willful ignorance. Comment 8 provides:

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, *the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious*.

Rule 4.2 cmt. 8 (emphasis added).

Explaining the basis for its ruling, the Court focused on the misrepresentation and deceit. Describing the deceptions used by the investigators, the Court stated:

> [W]hile I am mindful in this case that defense counsel have made efforts to retain the most experienced and professional investigatory companies and that at times some investigators may make improper statements to interviewees in their fervor to gain information, *attorneys who are officers of this court must realize that they are accountable and must supervise the investigators in order to assure that the type of misleading conduct that has previously occurred will not happen in the future*. I will not countenance this type of conduct and will therefore fashion a protective order to insure that, at least in this litigation in Delaware, *the parties and their agents will be guided by truth and honesty, and not by lies and deception.*

Monsanto Co., 593 A.2d at 1020 (emphasis added).

Ultimately, the *Monsanto* court found that to comply with Rule 4.2 and Rule 4.3, when questioning former employees, the attorney’s investigators must: 1) identify themselves and who they represent; 2) determine if the witness is represented by counsel; 3) cease questioning if

they are represented by counsel; and 4) ask permission to interview the witness if the witness is not represented. *Id.* at 1021; *accord Showell v. Mountaire Farms, Inc.*, 2002 WL 31818512, at *2 (Del. Super. Ct. Nov. 18, 2002).

B. What limits on compensating him as a fact witness do you face under the RPC and case law?

The issue of compensation for the reasonable value of the lost time of fact witness B has been addressed both by Courts and Ethics Committees. The American Bar Association Standing Committee on Ethics and Professional Responsibility ("ABA Committee") has examined this issue, and has concluded that a fact witness may be compensated for loss of time as long the testimony "is not conditioned on the content of the testimony and . . . the payment does not violate the law of the jurisdiction." ABA Ethics Formal Op. 96-402 at 1 (Aug. 2, 1996). The ABA Committee specifically concluded that the compensation may address time spent by the fact witness in review and research of records that are relevant to the testimony, pretrial interviews in preparation for testifying, and actual testimony at deposition or at trial. Id. at 2. The majority view accords with the reasoning and result of the ABA Committee. *See generally, Paying Fact Witnesses' Expenses Raises Ethical Concerns*, Product Liability Law and Strategy, May 1999 ("Fact Witnesses Article") (surveying majority law and citing five state ethics opinions in accord with ABA Committee); *see also New York v. Solvent Chemical Co.,* 166 F.R.D. 284, 289-90 (W.D.N.Y. 1996) (payment of a reasonable hourly fee to fact witness not improper in and of itself).

A minority of court decisions have held under particular circumstances that a party may not pay a fact witness for time expended in the preparation of his testimony. *See Hamilton v. General Motors Corp.,* 490 F.2d 223 (7'h Cir. 1973) and *Alexander v. Watson,* 128 F.2d 627 (1942)).[4] The minority view is that compensation may effectively buy the witness' cooperation and can subvert the administration of justice, and undercuts the value that testimony is a civic obligation. This minority view has been, in turn, faulted being unrealistic. *See* Elizabeth J. Sher & Ronald D. Coleman, Court Nixes Fees for Fact Witnesses, The National L.J., vol. 20, no. 4 (Sept. 22, 1997).

The ABA Committee has considered, in general, the issue of compensating a witness who is currently retired as follows:

> As long as it is made clear to the witness that the payment . . . is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party, the

> Committee is of the view that such payments do not violate the Model Rules.
>
> Nevertheless, the amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony. What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work - as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony - as, for example, where the witness is retired or unemployed - the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances.

ABA Ethics Formal Op. 96-402, at 3. *See also, Goldstein v. Exxon Research & Eng' g Co.,* 1997 WL 580599 at *3 (D.N.J. 1997) (corporate defendant could not pay a retired employee for time spent preparing to testify on facts within his personal knowledge); Colorado Bar Association Ethics Committee Formal Op. 103, at *5-6 (Dec. 19, 1998) (compensation should not make the witness "better off' than if he/she pursued other business opportunities)

In summary, the better reasoned authorities pemit compensation to fact witnesses in a manner sufficient to compensate them for their lost time. It may, therefore, be reasonable to compensate a real consultant/ former employee at his normal consulting rate, but perhaps not at an enhanced rate normally charged by experts. In the event the former employee is simply retired and not operating a consulting business, such that his testimony time were simply time away from his golf, museum visits, or grandchildren, some jurisdictions might prohibit compensation beyond out-of-pockets and a statutory witness fee.