The Use of Courtesy Depositions for Former Employee Depositions: An Arrow in the Quiver, an Ethical Trap, or Both?

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All defense lawyers whom have recently defended depositions of former employees in the health care, premises, employment, transportation and other industry sectors are aware of the dangers lurking during a plaintiff's deposition of a former employee. Plaintiff's deposition of a former employee is often an intimidating prospect to a former employee and dangerous for the defense because the employee is no longer employed with a former employer, may no longer have any fidelity to the employer, may have ill will to the employer, and may not have looked at all of the former employer records or considered the documents or circumstances at issue since leaving employment. These factors, among others, naturally place the former employee in a position of vulnerability before the deposition even begins. During the deposition, plaintiff's counsel's questions relating to "Reptile Tactics" or "safety rules," which are often conflated with questions relating to policies and procedures and federal and state regulations, can lead to a disastrous result and may bend or shame an unprepared former employee into saying "yes" to virtually any question asked. A bad deposition from a former employee hampers the defense prospectively and puts a ball and chain on the defense case for the duration of the litigation. What better or more potent argument from the plaintiff attorney to the jury than the argument that a former employee for the facts at issue *admitted* in deposition testimony harmful facts regarding the occurrence?

Defense lawyers have traditionally employed two paths to former employee depositions. First, examining the witness at deposition with relevant documents produced in discovery and establishing the defense theme through documents and testimony elicited during deposition. Second, if the defense attorneys learn before the deposition of significant adversity from the former employee because of ill will, a prior termination, or other reasons, the defense can engage in either a destructive cross examination or a combination of the first strategy and a destructive cross examination.

However, given the rise in Reptile Tactics, Nuclear Verdicts, and anti-establishment and anti-institution sentiment among jurors and witnesses, the first two traditional approaches to the deposition of a former employee are often insufficient to protect the interests of an entity defendant. A third very beneficial option exists for the defense when employed properly and carefully: the selective courtesy defense to the former employee. This strategy allows defense counsel to represent the former employee for purpose of the deposition only, and the defense can be re-evaluated for trial testimony. The benefits of the courtesy defense are manifold to both the entity defendants and the prospective former employee client. First, once defense counsel is engaged, plaintiff's counsel must cease *ex parte* contact with a former employee, preventing plaintiff counsel from speaking with or obtaining affidavits from former employees. Second, the courtesy defense establishes an attorney-client relationship and allows attorney-client deposition preparation, preparation, and more preparation. A former employee walking into a deposition or trial testimony without any preparation for a seasoned plaintiff's attorney is like a deer in the road for an on-coming truck. The courtesy defense allows the defense lawyer to prepare the former employee as much as necessary, mock the deposition preparation, and represent the employee at

the deposition or, potentially, at trial. The attached chart is a suggested starting point for ethical and tactical engagement of former employees[1].

The courtesy defense, however, may be improper and defense lawyers need to be aware of certain ethical limitations on this defense. First, since the defense lawyer may already be representing at least the entity defendant, defense counsel needs to make sure concurrent representation of another individual does not conflict with representation of existing clients. The substance of the American Bar Association Model Rules of Professional Conduct are generally in effect in each state and should be reviewed in conjunction with other ethical guidance from each appropriate licensing jurisdiction before commencing a courtesy defense. For example, Rule 1.7 prohibits a concurrent conflict of interest with a current client and also contains requirements for dual representation of multiple clients. This rule should be reviewed in-depth before considering a courtesy defense. Defense counsel will generally be unable to represent a former employee whose interests are materially adverse or antagonistic to the interests of the existing client(s) of the defense attorney, most specifically the entity defendant or group of existing defendants. Defense counsel should not expect to be able to cross-examine at deposition the deponent whom defense counsel is defending through a courtesy defense! If the deponent's interests are so far materially adverse to those of the existing clients, and the defense counsel makes this determination before the courtesy engagement, a courtesy defense should not be provided. A risk of disqualification exists if defense counsel proceeds, at minimum. In addition, at least one case found defense counsel cannot solicit employment of a courtesy defense. See Rivera v. Lutheran Medical Center, 866 N.Y.S.2d 520, 22 Misc.3d. 178 (2008), aff'd 899 N.Y.S.2d 859 (App. Div. 2010). Other cases are inapposite. See, e.g., Sullivan v. Saint-Gobain Performance Plastics Corporation, 2018 WL 11321826 (D. Vermont 2018) (unpublished). A review of the case law indicates Rivera may be limited to its facts and not have much following. One distinction appears to be the fact that a significant motive for solicitation of a courtesy defense is typically not financial gain, which is prohibited in the usual rules against solicitation for legal services under Model Rule of Processional Conduct 7.3.

In light of the ethical issues that may arise from the provision of a courtesy defense, the better approach to a courtesy defense may be for a prospective deponent to ask defense counsel for the defense as opposed to defense counsel asking or soliciting the deponent if defense counsel can provide the defense, for an insurer to assign the courtesy defense directly without involvement of counsel, or for a entity defendant to provide the defense itself to avoid involving counsel in the initial decision to assign counsel.

The use of a courtesy defense in defense litigation, when deployed appropriately and utilized appropriately, can be a powerful weapon against a seasoned plaintiff's attorney ready to pounce on a helpless former employee.

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[1] Max Brusky, Director of Claims Management at Bulkmatic in Griffin, Illinois, created this chart as a useful tool to consider the ethical and tactical issues when evaluating former employees and whether and how counsel should defend and approach former employees. Max is a speaker on the 2024 Winter Panel Presentation regarding defense of former employees.

	MODE OF SEPARATION		
Considerations	**Voluntary**	**Involuntary – unrelated reason**	**Involuntary – because of event**
Ethical	Simplest case. Former employee generally not hostile, adverse, or has divergent interest on relevant subject matter. Should be aligned and usual cognizance of conflicts should be employed. Can generally arrange for compensation for former employee's time spent, as if a current employee, on litigation or other defense without ethical issue.	More complex. Former may still be cooperative, but chances are less than if separated voluntarily. Since separation is unrelated, generally do not need separate counsel (or separate adjuster/manager, whether carrier or TPA), but should be considered if individual becomes hostile or adverse, or their interests become significantly divergent from the employer or insurer. Assurance of reasonable compensation, as if a current employee, for time spent by former employee for time spent can help greatly. Former employee may also be pursuing claims/litigation against former employer, and communications may need to go through the former employee's counsel for this action.	Most complex and likely to be fraught with tension. Least likely to be cooperative (but this is not foreclosed). Most likely to be hostile, adverse, and have interests divergent from the former employer and insurer. Conflict generally requires separate counsel (and separate adjusters) at the employer's or insurer's expense (contours of which are set out by state law). Conflicts and hostile interests may be apparent immediately or at the outset of an event. Employer must also take heed of punitive damages exposure through via ratification or gross negligence (by keeping a bad actor employee for too long, etc.). Former employee may also be pursuing claims/litigation against former employer, and communications may need to go through the former employee's counsel for this action.
Tactical	Can generally assume alignment and cooperation. Best approach is for counsel (most effective) or claims manager to "stay in touch" with the former employee, especially as it concerns contact information. Can present difficulty where former employee is a foreign national, or naturalized U.S. citizen with family and a significant part of their life located abroad. Can also present situation where defendant and defense counsel have an information advantage	Contact with former employee should almost always be handled by outside counsel so as to minimize contact with former employer. Maintaining contact should be handled in the same way as with a voluntary separation, but it is more critical given the higher likelihood of hostility or adverse/divergent interests. Former employee in this scenario is also more likely to be cooperative with plaintiffs or co-defendants. May require subpoena to secure testimony.	Should be handled in similar manner to former employee separated involuntarily for any reason. However, the need to keep employer and former employee separate in terms of contact is likely more acute, and this extends to controlling current employees' contact with the former employee, who is often attempting to contact current employees or even recruit them to his or her cause. Outside counsel and former employer contact with former employee should go exclusively through separate/conflict counsel.

	inasmuch the other side/parties might not be aware of a potentially missing witness. May also want to secure testimony by affidavit or sworn statement on relevant/critical facts while former employee remain reachable and cooperative.		