

# Ethical Considerations Managing Corporate Representations

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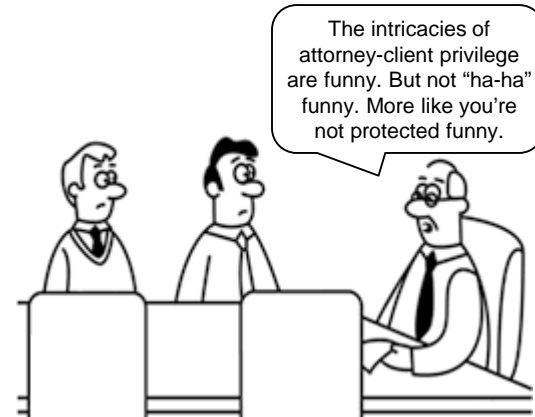
# *Office of Disciplinary Counsel v. Baldwin*, 225 A.3d 817 (Pa. 2020)

- During the Sandusky proceedings, Penn State General Counsel Cynthia Baldwin met with Penn State employees on behalf of Penn State.
- Ms. Baldwin informed the employees that she was general counsel, that nothing they said was confidential, and that they could retain their own attorneys.
- Subsequently, Ms. Baldwin accompanied the employees to testify before a grand jury. However, Ms. Baldwin failed to clarify that she represented only Penn State or otherwise specify the scope of her representation.



# Ms. Baldwin received a public reprimand for her conduct.

- Even when corporate counsel provides the proper warning, counsel must still avoid creating the impression, through their actions, that they are representing the employee individually.
- “*Upjohn* warnings are classically given when a corporation is conducting an internal investigation” and are for the purpose of ensuring “that the corporation [can] obtain legal advice.”
- Retaining independent counsel for an employee may be particularly prudent when responding to an investigation that is not purely internal, as conflicts of interest may arise.
- When seeking to represent multiple clients in the same matter, conduct a reasonable investigation before undertaking multiple representations and evaluate, on an on-going basis, whether multiple representations are feasible.



# *UpJohn Co. v. U.S.*, 449 U.S. 383 (1981)

- The *UpJohn* Doctrine privilege applies to communications with lower-level corporate employees if:
  - 1) Communications were made to in-house counsel at the direction of management;
  - 2) Information concerned matters within the scope of the employee's duties;
  - 3) Management had no other way to obtain the information about the internal operations at the company; and
  - 4) The employees who provided the information were aware that the corporation was seeking legal advice or representation regarding the matter in question.



# *UpJohn* Warning/Corporate Miranda

- This warning ensures that employees understand that the attorney represents the corporation, not the individual employee.
  - The warning should include that:
    - Counsel represents the company in the matter(s) under investigation.
    - Counsel does not represent the interviewee.
    - The interview is privileged and confidential.
    - This privilege, however, belongs to the company, not to the interviewee.

# Applicable Pennsylvania Rules of Professional Conduct

**Rule 1.7 - Conflicts of Interest with Current Clients.** So long as the representation is not directly averse to another client and the lawyer will not be materially limited in their ability to represent the client, a lawyer may represent a client notwithstanding a conflict of interest if:

- 1) a lawyer reasonably believes they will be able to provide competent and diligent representation to each affected client;
- 2) the representation is not prohibited by law;
- 3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- 4) each affected client gives informed consent, confirmed in writing.



# Applicable Pennsylvania Rules of Professional Conduct

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**Rule 1.13 - Organization as Client.** A lawyer may represent the corporation and any of its individual constituents (employees, members, shareholders, directors) so long as there is no disqualifying conflict of interest.

- **1.13(e).** Any dual representation in the same matter, however, requires that the lawyer obtain informed consent from both the organization and the individual to be represented.

# Important Principles Regarding the Representation of Corporate Employees



# Management employees pose the least risk for joint representation.

- When considering a motion to disqualify outside counsel from representing a current or former employee, courts generally distinguish between control group employees, whose acts or omissions bind the corporation, and lower-level employees. Courts have frequently disqualified outside litigation counsel from representing non-control group employees to prevent improper interference.

# Avoid joint-representation when the employee faces independent liability risk.

- Ethical rules often prohibit joint representation of a corporate employee in a deposition when the witness faces potential liability for their own conduct. While it may be possible to waive such conflicts, it increases the risk that outside counsel will be disqualified from representing the employee.



# Outside litigation counsel must not improperly solicit corporate employees.

- Ethical rules prohibit lawyers from directly soliciting clients in various circumstances. See Pa. R. Prof. Conduct 7.3 (prohibiting in person solicitation).
  - If a corporate client desires to cover the costs of a current or former employee's representation during a deposition, that offer should come directly from the corporation, and clearly state that the decision is up to the witness.
  - If the witness desires representation, he or she should then be provided with outside litigation counsel's contact information. Once contacted, outside litigation counsel should interview the employee and assess whether any conflicts of interest exist between the corporation and employee before entering an attorney-client relationship with that employee.

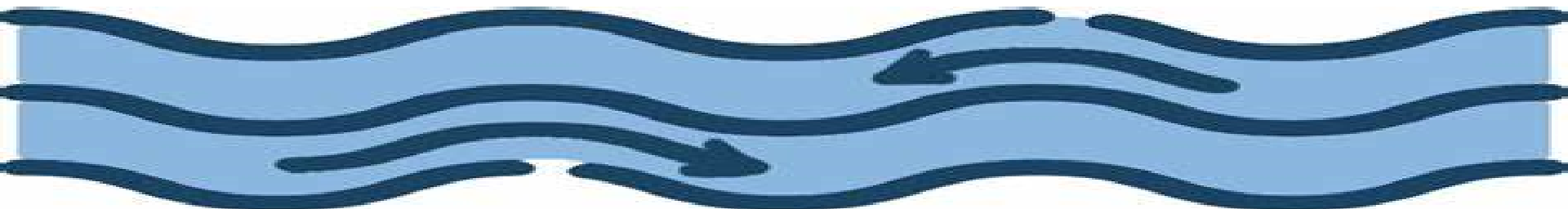
# Limit the scope of representation.

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- Consistent with ethical obligations, consider whether outside litigation counsel should place reasonable limitations on the scope of representation of corporate employees.
  - Regarding the deposition of an employee, limited representation may include meeting with the employee beforehand to assess potential implications for criminal or civil liability.

# Confidential information flows both ways.

- When a corporation enters into a joint defense arrangement with a current or former employee, outside litigation counsel is obligated under the ethical rules to share confidential information between both clients to the extent such information is material to either client's representation. See Pa. R. Prof. Conduct 1.7 cmt. 31 (stating "each client has the right to be informed").
  - Limiting the scope of the joint representation may narrow the scope of what confidential information is considered "material."



# Courts consider the context of the representation.

- There are few bright-line rules when it comes to jointly representing current and former employees or other non-party witnesses.
  - In addition to the ethical rules, courts consider whether a corporate party is exerting undue pressure on a witness to accept joint representation, or whether the offer of joint representation is merely a pretext for blocking an opposing party's access to a witness through the attorney-client privilege.
  - Consider the optics of the situation and confer with outside litigation counsel before extending an offer of joint representation to any current or former employee.



Context Matters



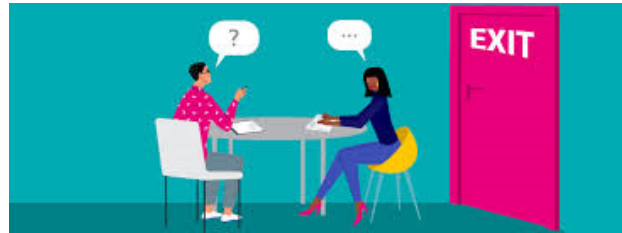
# Identify potentially key employees before they leave.

- Avoiding problems starts before employees become “former.” Good internal communication is critical to identify departing employees that may be relevant to litigation because they have special knowledge or were in divisions of the business subject to litigation.



# Conduct exit interviews of potential witnesses.

- Communications between the company and its former employees may not be protected by the attorney-client privilege. Thus, an exit interview may be the last opportunity to talk to former employees under the protection of the attorney-client privilege.
- Record employee contact information, and direct HR to maintain updated post-employment contact records, ensuring quick contact in case of litigation.
- Departing employees often purge documents and email files. Instruct them to review their files, including any files that the employee may maintain outside of the office, according to document retention policies and any litigation “holds” or exceptions.



# Obtain agreements to cooperate for key employees.

- When offering severance payments to a departing employee amidst potential or ongoing litigation, consider including provisions in the agreement requiring the employee to assist the company in litigation. Cooperation could include preparing for litigation (such as preparing the company's corporate representative under Fed. R. Civ. Proc. 30(b)(6)) or testifying at depositions or trial upon request.
- Consider requiring the employee to inform the company if they are contacted about litigation against the company.



# Cooperation Agreements

- Ensure that any compensation for cooperation in giving testimony be:
  - 1) provided expressly to compensate the former employee for their time and expenses, rather than the fact of testimony itself, and
  - 2) in an amount that is commensurate with the former employee's earnings (or earnings potential) at the time the testimony is given. See Pa. R. Prof. Conduct 3.4 (mandating “reasonable compensation”).
- Compensation for cooperation could be used to undermine the employee's credibility. When deciding whether to include a cooperation provision, consider whether the employee is departing on good terms, is likely to have knowledge relevant to potential litigation, and whether there are other employees that could testify or provide information if the departing employee is unavailable.

# Be careful with the privilege!

- Communications between the company's counsel and former employees may not be privileged. Some state courts have applied a bright-line rule denying privilege for such communications. See, e.g., *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188 (Wash. 2016).
- Counsel should familiarize themselves with the law in the relevant jurisdiction. Absent controlling precedent to the contrary, counsel should assume that communications are **not** privileged.



# Promptly reach out to former employees who may become potential witnesses.

- Early contact helps manage the message and prevent surprises.
- These calls can be difficult. No one wants to be drawn into litigation. Former employees are often “former” for a reason. They may harbor ill will toward the company or be indifferent as to what happens to it.
- Explain why you or your adversary may need to speak with the former employee, the status of the litigation, and whether their testimony is sought.
- Ask the former employee to alert you if they are contacted by your adversary. If they agree to be represented by company counsel, or by independent counsel at the company's expense, advise them to tell your adversary to contact the former employee's counsel and to say nothing else.
- Avoid delving into the dispute's specifics during the initial call. The former employee may still be assessing their potential involvement and may not be aligned with the company.

# Pick the right point of contact.

- Having a lawyer initiate contact is not always the best option. The former employee may feel most comfortable with someone whom they previously worked or otherwise knows. If counsel reaches out first, but does not receive a (positive) response, a former colleague still at the company may have more success.
- Caution should be exercised if the non-lawyer is also a potential witness. Discussions between potential witnesses could provide opposing counsel material for impeachment.
- Non-lawyers should be counseled to refrain from talking about the substance of the dispute and simply ask the former employee to contact the company's counsel.
- Consider whether a lawyer should monitor this initial call.



