

LITIGATION MINUTE: DON'T GET DISQUALIFIED - REPRESENTING CURRENT AND SEPARATED EMPLOYEES IN DEPOSITIONS

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

It is a common practice for outside litigation counsel to represent current, and even former, employees of corporate clients during depositions. This practice, however, is governed by ethical rules (and opinions and case law) that must be considered in advance. Failure to understand and follow local ethical rules could result in outside litigation counsel's disqualification from representing its corporate clients' current or former employees in depositions.

Management employees are the least risky candidates for joint representation

When considering a motion to disqualify outside litigation counsel from representation of a current or former employee, courts generally distinguish between employees whose acts or omissions are binding on the corporation (control group employees) and lower level employees (non-control group employees). Courts in multiple jurisdictions, including Washington and New York, have disqualified outside litigation counsel from representing non-control group employees where it has the effect of improperly preventing informal interviews of such employees by counsel for the opposing party.

Avoid joint-representation where the employee has an independent risk of liability

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

Outside litigation counsel must not improperly solicit corporate employees

Ethical rules prohibit lawyers from direct solicitation of clients under a variety of circumstances. 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 should make it clear that the decision is up to the witness. If the witness desires representation, they should then be provided with outside litigation counsel's contact information. Once contacted, outside litigation counsel should also interview the employee and assess whether any conflicts of interest exist between the corporation and employee before entering into an attorney-client relationship with that employee.

Limit the scope of representation

Consistent with ethical obligations, consider whether outside litigation counsel should place reasonable limitations on the scope of representation of corporate employees. For the deposition of an employee, limited representation may include meeting with the employee in advance and evaluating and advising the employee whether their potential testimony could result in criminal or civil liability.

Remember that 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. Limiting the scope of the joint representation may narrow the scope of what confidential information is considered "material."

Courts look at context when deciding a motion to disqualify

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.

*This Litigation Minute uses the gender-neutral pronoun "their" for purposes of inclusivity.

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