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The Worst "Ex" of All: Supreme Court Issues New Rules on Ex-Employees in Business Litigation

By Edward "Ward" Pankowski September 27, 2022

It's a business's worst nightmare: months or years into litigation over an important case, it comes out that attorneys for the other side have found and spoken with ex-employees of the business about information critical to that very case. In May of this year, the Supreme Court of Georgia laid out crucial new information for businesses and other organizations seeking to avoid that danger within the pages of Advisory Opinion No. 20-1.

When the Supreme Court invited comments on its published draft of Opinion No. 20-1, debate raged over whether an attorney ought to be able to contact and interview former employees of an organization, including organizations represented by counsel themselves, in order to obtain information that that attorney could then use against the organization in litigation. For the Georgia Defense Lawyers Association, the answer was a strong "No." Former employees, the GDLA argued, ought to be classified as agents or employees of a represented organization such that the Georgia Rules of Professional Conduct would protect them from attorneys who might seek to contact them.[1]

Ultimately, the Supreme Court rejected the GDLA's arguments, drawing a distinction between current and former employees.[2] Attorneys, the Supreme Court ruled, may now seek to interview an organization's ex-employees about matters that may be relevant to litigation concerning that same organization.

Georgia businesses and other organizations must take steps to adapt and respond, lest they be caught flat-footed by plaintiffs' attorneys wielding a potentially potent new weapon in Opinion No. 20-1. Organizations should assist defense counsel in swiftly investigating who has knowledge essential to the litigation and what precisely they know. Informed counsel can build a strong defense against risks they are aware of, but it is far more difficult to defend against the unknown. At the same time, organizations might also seek to use Opinion No. 20-1 to their advantage, such as in cases where it might be beneficial to interview a plaintiff organization's ex-employees.

New rules regarding contacting ex-employees also demand a change in tactics by defense counsel, including moving quickly to discover who the plaintiff's attorneys have spoken with. Learning what information was discussed will typically require interviewing the same ex-employee to learn what the plaintiff's attorney asked them and what they said in response. Accordingly, defense counsel should incorporate Opinion No. 20-1 into their discovery requests, potentially learning about other ex-employees with knowledge who may need to be contacted and interviewed. Additionally, defense counsel should work with any cooperative ex-employee to determine who, precisely, would have information that a plaintiff's attorney might seek out, so that interviews may be conducted and plans prepared to respond accordingly.

Fortunately, Opinion No. 20-1 still imposes some restrictions on attorneys seeking to interview ex-employees. Opinion No. 20-1 explicitly requires an attorney seeking to speak with an ex-employee to disclose (1) the identity of the lawyer's client and the client's interest in relation to the organization; and (2) the reason for the communication.[3] Existing rules and contractual provisions also remain in effect; for example, an ex-employee subject to a non-disclosure agreement is still bound by that agreement. The Supreme Court also warned against attorneys seeking to extract information protected by legal privileges, such as the attorney-client privilege, or failing to disclose the identity of their client and the reasons for their communication with the ex-employee.[4]

However, the issue of how the attorney-client privilege applies to communications between counsel for an organization and ex-employees of that organization is not a settled one. In some cases, it is possible for defense counsel to inadvertently disclose privileged information or work product to an ex-employee. Certain federal courts, for example, have held that the attorney-client privilege does not protect communications made between a corporation's attorney and ex-employee that could potentially affect the ex-employee's testimony, whether "consciously or unconsciously."[5] Thus, defense counsel should be wary, and may even go into an interview with an ex-employee with the assumption that anything they say will fall outside the attorney-client privilege, and proceed accordingly.[6]

The business world is fast-moving, and the same is true of the world of litigation involving those businesses and other, similar organizations. Advisory Opinion No. 20-1 is another reminder that in the challenging, uncertain realm of litigation, keeping abreast of new legal developments, and responding to them accordingly, can mean the difference between victory and catastrophe.

[1] *In re Formal Advisory Opinion No. 20-1* (2022)

[2] *Id.*

[3] *Id.*

[4] *In re Formal Advisory Opinion No. 20-1* (2022)

[5] *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999); *see also In re Moring Song Bird foot Litig.*, No. 3:12-cv-01592, 2017 U.S. Dist. LEXIS 198109, at * 7 (S.D. Fla. Nov. 29, 2017)

[6] Douglas R. Richmond, The Attorney-Client Privilege and Former Employees, 70 Cath. U. L. Rev. 39 (2021).