

The image features a large red diagonal shape on the left side, which serves as a background for the main text. On the right side, there is a grayscale photograph of a modern multi-story office building with a glass facade. The word "Bradley" is visible on the building's facade in a light gray font. The overall design is professional and corporate.

Bradley

Out of Sight But Not Out of Mind:

Dealing With Former Employees in Litigation and the Rules of Ethics You Should Know

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Overview

- **Introduction**

- Defensive – How Do You Approach Opponent's Former Employee?
- Offensive – What Happens if Your Former Employee Has Disclosed Information to Your Opponent?

- **Case Examples**

- When a CIO Goes Rogue
- When a CEO Goes Rogue
- When an Employee Steals Proprietary Information

Overview

- **Legal Landscape**
 - Rules of Ethics
 - Sanctions
- **Good Practices to Avoid Pitfalls**
- **Friendly Former Employees**

CIO Goes Rogue

- **Software development dispute with offshore software developer**
- **CIO charged with investigation and consulting with corporate counsel**
- **Asked to prepare memorandum of findings of problems with services of offshore developer**
- **CIO is terminated as the investigation winds down**

CIO Goes Rogue

- **Opposing counsel contacts CIO**
- **CIO provided affidavit**
 - Said developer was great; no problems
 - States that he was requested to come up with a “faux” list of problems to support termination
- **Affidavit filed with Court**
 - Unfair and deceptive practices claim based entirely on contents of affidavit
- **Motion for Sanctions and to Strike**

CIO Goes Rogue

- **Granted**
- **Excluded witness and documents he provided developer's attorney**
- **Developer's attorney was not to communicate with witness again**
- **Destroyed unfair and deceptive practices claim**
 - Subsequently dismissed

CEO Goes Rogue

- Client was a company providing services to various hospitals and other health care providers
- Client was sued for failing to pay commissions on provided services allegedly owed pursuant to a letter agreement with the plaintiff
- Thirteen causes of action, but main dispute was over amount of commissions owed
- **Pre-litigation:** Former CEO discussed the plaintiff's claim for commissions with general counsel, including company financial reserves, risk assessment, and other strategy in anticipation of litigation
- **Litigation:** Plaintiff's attorney interviewed former CEO

CEO Goes Rogue *cont.*

- During interview, former CEO disclosed confidential and proprietary information to the plaintiff's attorney, including a spreadsheet of hypothetical commissions earned created at the direction of general counsel
- Plaintiff's counsel filed affidavit of former CEO containing information and spreadsheet in support of response in opposition to motion for summary judgment
- We filed motion to strike and for sanctions against Plaintiff's counsel
- Court granted motion to strike but declined to issue sanctions

Employee Steals Proprietary Information

- Client provides third-party logistic services
- Uses proprietary processes
- Employee signed non-solicit and non-disclosure agreement
- Prepares to leave company and sends proprietary data to his personal email

Employee Steals Proprietary Information

- Client discovers that employee stole customer lists, financial data on customers, etc.
- Contacted employee
- Sent thumb drive with some of the information but not all
- Alleges he gave his computer to Goodwill
- TRO

Employee Steals Proprietary Information - Whistleblower, *Qui Tam*

- IASIS Healthcare *qui tam* lawsuit pending since March 2005
- Plaintiff stole documents from IASIS and attempted to use them against the company in his lawsuit
- Plaintiff's counsel unilaterally reviewed the documents, which were subject to claim of attorney-client privilege by IASIS, relied on the documents in drafting the complaint, disclosed the documents to the DOJ, and failed to notify either IASIS or the court about their possession and use of the documents
- Court ruled that Plaintiff's counsel breached numerous ethical and legal duties
- **Sanctions against counsel:** monetary sanctions, disqualification

Rules of Ethics

- In 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.
 - Tenn. Sup. Ct. R. 8, RPC 4.2

Rules of Ethics

- In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with a member of the governing board, an officer or managerial agent or employee, or an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter. . . . **In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization.**
 - Tenn. Sup. Ct. R. 8, RPC 4.2, Comment 7

Rules of Ethics

- **A lawyer who receives information (including, but not limited to, a document or electronically stored information) relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 [*which broadly prohibits a lawyer from revealing information relating to the representation of a client*] (including information protected by the attorney-client privilege or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such information to the lawyer, shall:**
 - (1) immediately terminate review or use of the information;
 - (2) notify the person, or the person's lawyer if communication with the person is prohibited by RPC 4.2, of the inadvertent or unauthorized disclosure; and
 - (3) abide by that person's or lawyer's instructions with respect to disposition of written information or refrain from using the written information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.
 - Tenn. Sup. Ct. R. 8, RPC 4.4(b)

Rules of Ethics

- The duties imposed by paragraph (b) on lawyers who know or who reasonably should know that they have received information protected by RPC 1.6 that was disclosed to them inadvertently or by a person not authorized to disclose the information to them reflect the **importance of client-lawyer confidentiality in the jurisprudence of this state** and the judgment that lawyers in their dealings with other lawyers and their clients should take the steps that are required by this Rule in the interest of protecting client-lawyer confidentiality even if it would be to the advantage of their clients to do otherwise.
 - Tenn. Sup. Ct. R. 8, RPC 4.4(b), Comment 2

Rules of Ethics

- Rules vary based on jurisdiction
- Maryland
 - “In communicating with a **current agent or employee of an organization**, a lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary privilege or other privilege of the organization.” Rule 19-304.2 (comment 6).
 - Previously did not address former employees; now directs to Rule 19.304.4(b)(4.4).
 - “An attorney who receives a document, electronically stored information, or other property relating to the representation of the attorney's client and knows or reasonably should know that the document, electronically stored information, or other property was inadvertently sent shall promptly notify the sender.”
 - The Rule “**does not address** the legal duties of an attorney who receives a document, electronically stored information, or other property that the attorney knows or reasonably should know may have been inappropriately obtained by the sending person.”

Rules of Ethics

■ Virginia

- “In 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 by law to do so.” Rule 4.2.
 - This applies even if the represented party initiates or consents to the communication. See Rule 4.2, comment 3.
- Prohibits communications with persons in the organization’s “control group” (as defined in Upjohn v. United States, 449 U.S. 383 (1981)) or persons considered to be “alter egos” of the organization (*i.e.* anyone with the authority to bind the organization)
- “The prohibition ***does not apply to former employees*** or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization’s “control group.”
- A lawyer shall not “request a person other than a client to ***refrain from*** voluntarily giving relevant information to another party unless . . . the person in a civil matter is a relative or a current or former employee or other agent of a client; and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.” Rule 3.4(h).

Judge's "Rules of the Road" for Former Employee Interviews

- **Lass v. Pacific Paper Products, Inc., No. 10-CV-2737-M1/P (W.D. Tenn. March 9, 2011)**
 - Court gave these mandatory guidelines that counsel had to follow before conducting an interview with former employee of opposing party:
 - Counsel shall immediately identify himself as the attorney representing plaintiff in the instant lawsuit and specify the purpose of the contact;
 - Counsel shall ascertain whether the former employee is represented by counsel, and if so, the contact must terminate immediately;
 - Counsel shall advise the former employee that participation in the interview is not mandatory and that he or she may choose not to participate, or to participate only in the presence of the former employee's personal attorney or defendant's attorney, and counsel must immediately terminate the interview if the former employee does not wish to participate;
 - Counsel shall advise the former employee to avoid disclosure of privileged or confidential corporate information; and
 - Counsel shall not attempt to solicit privileged or confidential corporate information and shall immediately terminate the interview should it appear that the former employee may reveal privileged or confidential information.

Possible Sanctions

- **Harsh**
 - Exclusion of testimony and/or of confidential and proprietary information solicited
 - Monetary sanctions against counsel and/or counsel's client in the pending litigation
- **Harsher**
 - Disqualification of counsel and/or counsel's law firm
- **Harshest**
 - Suspension of counsel from legal practice

Possible Sanctions

■ Disqualification

- Maryland district court has not hesitated to disqualify counsel from pending litigation.
- Camden v. State, 910 F. Supp. 1115 (D. Md. 1996)
 - Counsel used confidential and privileged information obtained from former employee in various motions filed with the court = disqualification
- Zachair, Ltd. v. Driggs, 965 F. Supp. 741 (D. Md. 1997)
 - “This wrongly obtained knowledge ‘can never be erased from [counsel’s] mind,’ and as a consequence the information must be excluded and counsel must be disqualified.”

Possible Sanctions

- Hill v. B. Frank Joy, LLC, No. CV TDC-15-1123, 2016 WL 4521650, at *4 (D. Md. Aug. 26, 2016)
 - Called Camden into question
 - Considered amendment to Maryland ethical rules regarding former employees
 - At the time, Rule 4.4(b) stated: “In communicating with third persons, an attorney representing a client in a matter shall not seek information relating to the matter that the attorney knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived.”
 - It required an attorney who received such information to “(1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.”
 - Rule 4.4(b) was amended after Hill; provides even more leniency for attorneys representing former employees

Good Practices to Avoid Pitfalls

- Confidentiality provisions in Employment Agreements
- Severance Agreements
 - Confidentiality
 - Duty to Cooperate in Litigation
- Obtain affidavit or statement from former employees **prior to** their departure
- Review emails and hard drive from work station, and back everything up
- Preserve all files of former employee
- Affirmation from former employee that he or she is not in possession of confidential or privileged information

Friendly Former Employees

- Former employees can also be necessary and extremely helpful in litigation.
- **Example:** Controller left employment in the middle of litigation only months before trial. Her testimony was necessary to challenge plaintiff's erroneous calculation of damages. Trial was in Chattanooga, but she lived in Orlando, FL. Could not compel her to testify at trial.
- Consulting Agreement
 - Substantial hourly or flat rate for assisting (particularly if extensive travel involved)
 - Confidentiality provision
 - Provide scope of assistance needed
 - Continue to be agent of client for purposes of litigation only

Questions?



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