WHERE'S THE WITNESS? PRESERVING WITNESS TESTIMONY THROUGH TRIAL

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Effectively Litigating Employment Cases
from Inception Through Trial
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I. EX PARTE COMMUNICATION WITH WITNESSES

A. Florida Bar Rule 4

1. An ex parte communication is one outside the presence of the witness's or the employer's lawyer.

2. Any contact must conform to the Florida Bar Rules of Professional Conduct.

B. Florida Bar Rule 4-4.2

1. 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.

   - Unless doing so to comply with a court rule, statute or contract requiring notice or service of process directly on an adverse party.

2. When an organization is the represented person, the Rule prohibits communication with a constituent of the organization who:

   - Supervises, directs or regularly consults with the organization's lawyer concerning the matter;

   - Has authority to obligate the organization with respect to the matter; or

   - Whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

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[1] These materials are distributed by the Sass Law Firm for informational purposes only. These materials should not be considered legal advice and should not be used as such.

[2] Thank you to Alicia Knoepke, Esquire of Trenam Law for her contributions to these written materials and for co-presenting these materials.

3. Consent of the organization's lawyer is not required for communication with a former constituent.

4. If a constituent is represented in the matter by his or her own counsel, consent of that counsel is sufficient.

5. In communicating with current and former constituents of an organization, a lawyer cannot use methods of obtaining evidence that violate the rights of the organization.

II. EX PARTE COMMUNICATION WITH FORMER EMPLOYEES

A. Florida Bar Rule 4-4.2

1. The Comment to Rule 4-4.2 was amended in 2006 to specify that consent of an organization's lawyer is not required for communication with a former constituent.

2. Prior to that, the leading authority in Florida on the issue was *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997).

B. Florida Bar Rule 4-4.3

1. *H.B.A. Management Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997).

   a. Contact with former employees of defendant-employer was not prohibited regardless of whether the former employee's acts or omissions form a basis for liability.

   b. But, no inquiry can be made into attorney-client privileged matters.

   c. And, the requirements of Rule 4-4.3 must be met:

      ✓ Identify your client;

      ✓ State whether your client has interests opposed to the witness and/or his or her former employer; and

      ✓ Cannot give legal advice to unrepresented witnesses.

C. Case Law

1. *Allstate Insurance Company v. Bowne*, 817 So. 2d 994 (Fla. 4th DCA 2002).

   a. Court found no violation of Rule 4-4.2 where the communication was made to a former, management-level employee of Allstate who had become employed by a subsidiary of Allstate.

b. The lawyer had a reasonable basis to believe that the witness was now employed by a different entity than the one sued, and had no reason to believe the witness's statements could serve as admissions on behalf of Allstate.

2. Federal court decisions have varied:

a. *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651 (M.D. Fla. June 30, 1992).

- Prior to the amendment to the Comment to Rule 4-4.2, and prior to *H.B.A. Management*.

- Former managerial employee who had confidential information relevant to the defense was a party for purposes of the rule prohibiting ex parte communications with the opposing corporate party.

b. *Pepperwood of Naples Condominium Association, Inc. v. Nationwide Mutual Fire Insurance Company*, No. 2:10–cv–753–FtM–36SPC, 2011 WL 4382104 (M.D. Fla. Sept. 20, 2011) (Ft. Myers).

- Communication with former low-level employees may be done ex parte.

- But, contact with former Senior Commercial Claims Representatives or Managers who worked on the claims at issue must be done through defense counsel.

III. EX PARTE COMMUNICATION WITH CURRENT EMPLOYEES

A. Florida Bar Rule 4-4.2

1. There are three categories of current employees under Rule 4-4.2 that an attorney cannot contact without consent of counsel:

- Those who supervise, direct, or regularly consult with the organization's lawyer concerning the matter;

- Those with authority to obligate the organization with respect to the matter; and

- Those whose acts or omissions in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

2. *H.B.A. Management* tells attorneys to go by the plain language of the Rule and Comment:

- Underlying purpose of these three categories is to prevent communication with employees that can bind the corporation or result in vicarious liability.

- The court recognized that the purpose of Rule 4-4.2 "is not to protect a corporate party from revelation of prejudicial facts, but rather to preclude interviewing of employees who have the authority to bind the corporation." *Id*., at 543.

- Florida Statute Section 90.803(18)(d): hearsay exception for admissions:

  - ✓ Must be "made during the existence of the relationship"

3. If a current employee is represented by his or her own counsel, consent by that counsel is sufficient.

4. Florida federal district courts disagree about the circumstances pursuant to which attorneys can communicate with current employees:

   - The individual courts within a district may disagree, or impose different restrictions.

   - Remember: Rule 4-4.2 still applies.

5. The rule does not prohibit contact with employees who fall outside of these three exceptions, and courts in this district do not impose any such prohibition.

C. Case Law

1. *Lee Memorial Health System v. Smith*

   - In a medical malpractice case, the court allowed plaintiff's counsel to communicate ex parte with a child's treating physicians (who were not involved in the alleged malpractice incident) who were employed by the defendant hospital.

   - Treating physicians did not fall into any of the three categories referenced in the Comment to Rule 4-4.2.

2. *Russell v. City of Tampa* denied sanctions and protective order.

   - In a retaliation case, plaintiff's counsel interviewed and obtained an affidavit from a City mechanic as to specific events he witnessed and submitted it in support of summary judgment.

   - Defense counsel filed a motion for sanctions against plaintiff's counsel stating that by speaking to the mechanic without permission plaintiff's counsel was in

violation of the Florida Bar Rules of Professional Conduct and requested a protective order.

- The court found that use of its inherent power to sanction is not warranted as the current employee did not meet any of the three categories referenced in the Comment to Rule 4-4.2, and defense counsel specifically stated during the hearing that she did not represent the mechanic.

3. *Howard v. Second Chance Jai Alai, LLC, No:* 5:15-cv-200-Oc-PRL, 2016 WL 367844 (M.D. Fla. Jan. 29, 2016) (Ocala).

   - An attorney may conduct ex parte interviews with current employees, excluding managerial employees.

   - Any information obtained may not be used to bind the defendant or as an admission by a party-opponent.

4. *Joynes v. NCL America, Inc.,* No. 1:08–23493–CIV, 2010 WL 107733 (S.D. Fla. Jan. 7, 2010) (Miami).

   - Court allowed ex parte communication with current, non-managerial employees, but with measures to protect against disclosure of confidential information.

   - Any information obtained during ex parte interviews could not be used as binding admissions against the corporation.

5. *Hyde v. Storelink Retail Group, Inc.,* No.: 8:07-CV-240-T-30MAP, 2008 WL 11336635 (M.D. Fla. Apr. 8, 2008) (Tampa).

   - Rule 4-4.2 does not prohibit contact with current employees other than the three restrictions listed in the Comment.

   - Plaintiff's counsel's ex parte contact with a District Manager/Leader was not prohibited because although District Managers/Leaders had some supervisory responsibilities, they were insufficient to obligate the company.

6. *NAACP v. Florida Department of Corrections*, 122 F. Supp. 2d 1335 (M.D. Fla. Sept. 21, 2000) (Ocala).

   - Attorney may conduct ex parte interviews with current employees, excluding managerial and other control group employees whose statements could generally be considered an admission by party-opponent, pursuant to a set of protective measures laid out by the court.

IV. WITNESS INTERVIEW AND STATEMENTS

A. Witness Interviews

1. To comply with the requirements discussed above, at the outset of an interview you should:

   - ✓ Clearly identify yourself;
   - ✓ Clearly identify your client;
   - ✓ Confirm that the witness is not represented by an attorney;
   - ✓ State whether your client has any interests opposed to the witness and/or his or her former employer;
   - ✓ Not provide any legal advice;
   - ✓ Identify the purpose of your interview;
   - ✓ State that the interview is not mandatory;
   - ✓ Indicate that the witness may choose not to participate, or can participate in the presence of their personal attorney or defense counsel; and
   - ✓ Ensure no privileged information is obtained.

2. Consider what information from your witness interview may be discoverable.

   a. Florida Rule of Civil Procedure 1.280(4) and Federal Rule of Civil Procedure 26(b)(3):

      - Documents prepared in anticipation of litigation or for trial by a party or a party's representative may be obtained by another party only upon a showing of need ("substantial" need in federal court) and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

      - When production is ordered, the court must protect against the disclosure of mental impressions, opinions, legal theories or conclusions of an attorney or other representative.

3. Names and contact information of witnesses are generally discoverable.

4. While the names of all witnesses are ultimately discoverable, there is nothing in Rule 4-4.2 that expressly requires plaintiff to notify defense counsel of the names of the rank-and-file employees she intends to contact prior to doing so.

5. However, courts have taken different approaches to this issue:

   a. *Compare*, *Pepperwood of Naples Condominium Association, Inc. v. Nationwide Mutual Fire Insurance,* 2011 WL 4382104, at *4 (M.D. Fla. Sept. 20, 2011) (requiring plaintiff to contact defendant's employees through defendant's counsel) to *Stone v. Geico General Ins.,* (M.D. Fla. Nov. 7, 2005) (imposing no requirement that plaintiff notify defense counsel prior to contacting rank-and-file employees).

   b. *See also*, *NAACP v. Florida Department of Corrections*, 122 F. Supp. 2d 1335 (M.D. Fla. Sept. 21, 2000) (imposing certain requirements upon plaintiff in that specific case, but noting that the requirements were not binding on future cases and that there is no "bright line rule to follow[.]" *Id*. at 1335, 1340.

B. Witness Statements

1. Witness statements will generally be protected as work product, and subject to production only as outlined in the rules above:

   a. *Selton v. Nelson*, 201 So. 3d 827, 828 (Fla. 5th DCA 2016) (quashing lower court's order to produce witness statements in the form of affidavits, because no showing was made for the production as required by Rule 1.280).

   b. *Winn-Dixie Stores, Inc. v. Gonyea*, 455 So. 2d 1342, 1344 (Fla. 2d DCA 1984) (even if witness statements conflicted with deposition testimony, that is insufficient to penetrate the work product privilege).

V. AFFIDAVITS

A. Use of Affidavits

1. Affidavits can be used:

   - As part of a charge of discrimination or a position statement;
   - To support or oppose summary judgment; or
   - To impeach a witness.

2. But, affidavits are ordinarily not admissible at trial.

- Consider preserving the testimony of witnesses through affidavits first, but remember an affidavit will generally be insufficient for trial (except for impeachment purposes).

B. Requirement for Affidavits

1. Requirements:

   - Personal knowledge;
   - Competency;
   - Set forth facts that would be admissible in evidence; and
   - Attach sworn or certified copies of all documents referenced.

2. *See* Florida Rule of Civil Procedure 1.510(E) and Federal Rule of Civil Procedure 56(C)(4).

VI. DEPOSITIONS

A. Types of Depositions

1. In person;
2. Telephonic;
3. Videotape;
4. Proxy through local attorney; or
5. Written questions.

B. Purposes of Depositions

1. Discovery of information;
2. Preserving testimony;
3. Impeachment;
4. Obtaining and authenticating documents;
5. Supporting or opposing summary judgment; and
6. Trial testimony.

C. Deposition Preparation

1. If authorized, consider interviewing a witness before taking his or her deposition, to better determine what the witness knows.

2. Consider all information a witness may have:

    a. Use jury instructions, position statements, pleadings, and motions to analyze what you will need to prove for summary judgment or at trial.

    b. Review documents produced and written discovery responses to determine issues to address with deponent.

    c. Ask your expert what information he or she needs to obtain from the deponent.

    d. Ask your client what information he or she believes the deponent has.

3. Analyze how you may use the deposition for summary judgment and trial.

4. Develop an outline and gather exhibits.

C. Taking the Deposition

1. Your style and demeanor depend on the following:

    a. Friendly or hostile witness;

    b. Sophistication of witness;

    c. Deposition and trial experience of the witness;

    d. Subject matter of the dispute;

    e. Whether you know the answer to the question you are asking;

    f. Whether the deponent is lying; and

    g. Whether the deponent is being evasive or non-responsive.

D. Instructing a Witness Not to Answer During a Deposition

1. Only allowed for:

    a. Privilege;

b. Court-ordered limitation; or

c. To make a motion to terminate or limit the deposition.

2. *See* Florida Rule of Civil Procedure 1.310(C) and Federal Rule of Civil Procedure 30(C)(2).

E. Deposition Objections

1. Note on record; testimony is taken subject to the objections. Fla. R. Civ. P. 1.310(c); Fed. R. Civ. P. 30(c)(2).

2. Waiver:

a. If an issue might be corrected at the time, you are generally required to timely object during the deposition. Fed. R. Civ. P. 32(d)

b. Form objections are waived unless timely asserted during a deposition.

- Ambiguous or vague;
- Assumes facts not in evidence;
- Mischaracterizes or misstates testimony or evidence;
- Compound;
- Asked and answered;
- Lacks foundation;
- Speculation;
- Calls for legal conclusion;
- Leading; or
- Argumentative.

3. Must be stated "concisely" and "in a nonargumentative and nonsuggestive manner." Fla. R. Civ. P. 1.310(c); Fed. R. Civ. P. 30(c)(2).

a. "[C]ounsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the Court." Middle District Local Rule 5.03(b)(12)(made applicable to depositions by Middle District Discovery Handbook (2015) p. 7).

b. "[A]ttorneys should not attempt to prompt a deponent by suggestive or unnecessarily narrative objections." Middle District Discovery Handbook (2015) p. 9.

4. Form Objections:

a. Courts disagree about whether you should state simply "objection to form" or articulate the basis of your form objection

b. Middle District Discovery Handbook (2015) p. 8 says "objection to form" or equivalent "normally suffices." The attorney who asked the question can ask the objecting attorney to state the specific objection; if he or she chooses not to, the objection is preserved.

c. But, Middle District Local Rule 5.03(b)(12) seems to require more:

- "Counsel should state . . . the legal grounds for the objection."

F. Depositions Used for Summary Judgment

1. Deposition testimony can be used as summary judgment evidence. Fla. R. Civ. P. 1.510 and Fed. R. Civ. P. 56.

2. Consider drafting your summary judgment motion prior to taking key depositions, to ensure you analyze all facts you need to obtain through deposition testimony

G. Trial Use of Depositions

1. You can use a deposition at trial and other court proceedings against any party who was present, represented at, or had reasonable notice of the deposition, to the extent admissible under the evidence rules, as follows:

a. Impeachment or any other purpose permitted by the evidence rules;

b. Deposition of a party can be used by an adverse party for any purpose; and

c. Deposition of a witness can be used by any party for any purpose if:

- Witness is deceased;

- Witness is greater than 100 miles from the proceeding;

- Witness is out of state (Florida) or out of the U.S. (Federal);

- Witness is unable to attend or testify due to age, illness, infirmity, or imprisonment;
- Unable to procure attendance of witness by subpoena;
- Exceptional circumstances; or
- Expert or skilled witness (Florida).

2. *See* Florida Rule of Civil Procedure 1.330 and Federal Rule of Civil Procedure 32.

DISCLAIMER

The laws and cases referenced in these materials may have changed since the date of publication.

These materials are being made available for informational purposes only and are not to be relied upon as legal advice.

If you have an employment law question,
we urge you to seek legal counsel.