

Be Productive, Efficient And Discreet When Contacting Current Employees

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During employment litigation it is often necessary to obtain corroborating factual information by identifying and contacting current employees of the defendant organization. Such efforts may prove time-consuming, costly and ineffective if handled improperly. The fact finder is therefore urged to adopt a "survey" approach when initially contacting employees in such cases.

The fact finder's initial emphasis should be upon contacting employees quickly and efficiently while determining their point of view and bias in favor of one party or the other. Those who are clearly adverse to the plaintiff's position are quickly discarded during this phase of the inquiry while those who are identified as factually supportive may be evaluated for further contact. Such an approach permits the fact finder to cover a lot of ground quickly, efficiently and productively while maximizing legal counsel's return on investment in the investigation.

Contacting current employees of a defendant employer can be a delicate proposition, particularly when the point of view or bias of those contacted is unknown or uncertain. In such instances, the fact finder must be careful to elicit meaningful information from the contact while being cautious about unnecessarily divulging details of the inquiry. This is particularly true during pre-complaint investigations or during investigations commenced after a complaint for damages has been filed, but before the defendant employer is aware of an active investigation.

The following steps are recommended for the fact finder engaged in the contact of current employees of unknown or uncertain point of view or bias:

Contact employees away from work when possible.

Although contacting employees away from the job may seem axiomatic, there are often circumstances which require employees to be contacted in the workplace. For instance, the plaintiff might know only the first name of an employee identified for contact. In other cases, an employee's job title, physical description or duties and responsibilities may be known, but not his or her name. All of these circumstances may rule out the use of traditional research methods, thereby necessitating contact with the workplace telephonically or in-person.

Although some employees are willing to talk openly about their organization's employment practices while they are in the workplace or in the presence of coworkers, this is the exception rather than the rule. The vast majority of employees value their jobs if for no other reason than the pay and benefits they provide. Even those who are disgruntled or have an obvious reason for being so usually do not seek to intentionally antagonize their employer by being viewed as supporting an employee with a legal grievance.

Employees may be very uncomfortable about being contacted at work regarding a coworker's complaint or lawsuit, whether in person or by telephone. This is particularly true during difficult economic times when job value may be at a premium. The fact finder is therefore cautioned to use care and discretion when initiating such contact. Discretion should be used to avoid drawing unnecessary attention to the contact with the employee, and communication should occur

privately so that coworkers are unaware of the nature of the contact. Care should be exercised to avoid disclosing more information than necessary regarding the nature and purpose for the contact until the employee's point of view can be ascertained.

Contact employees initially by telephone when possible.

Telephonically contacting witnesses has traditionally been viewed as the lazy man's way of doing business within the realm of legal investigation. Such telephonic contact is a sound practice when employing the survey method described herein in the context of employment litigation. This is particularly true when contacting current employees of unknown point of view or bias. Such a method provides the fact finder with a means of *controlling the contact* that may not be present during face to face communication.

Another benefit to contacting employees initially by phone relates to efficiency of process. Employment-related investigation may be time-consuming, and they may involve identifying and contacting many current and former employees of the defendant organization. Doing so telephonically permits the fact finder to cover a lot of ground efficiently, thereby providing legal counsel with more "bang for the buck."

Utilize a scripted introduction with each employee.

Consider utilizing a carefully prepared script for providing introductory information when contacting employees. Such scripts have several potential benefits:

- A well thought-out script can help the fact finder provide each contact with the same uniform, carefully worded introductory information.
- A carefully crafted script can provide the employee with sufficient psychological security about the identity of the fact finder and the legitimacy of the contact to enable him or her to respond to the fact finder.
- A carefully crafted script can provoke a level of curiosity within the employee which motivates him or her to cooperate by responding to the fact finder's questions.
- A script helps the fact finder avoid saying too much initially during positive as well as adverse contacts.
- A script permits the fact finder to testify, if necessary, that such a document was used for all contacts, and that all contacts were provided with the same introductory and identifying information.
- A script helps insulate the fact finder from claims of misrepresentation by dishonest or intellectually challenged employees biased in favor of the defendant employer.

Utilize a scripted series of initial questions.

A brief script containing a series of carefully crafted interview questions can be very useful in helping the fact finder make a preliminary determination about which employees may possess relevant factual information. Such scripts have several benefits:

- A well thought-out script assists the fact finder in asking a uniform series of assessment questions aimed at quickly revealing the employee's point of view and revealing his or her bias. This is useful for determining whether to pursue additional inquiry with the employee or whether to terminate the contact.
- A script helps the fact finder avoid saying too much initially during positive as well as adverse contacts. Be wary of "moles" who respond favorably to being contacted despite harboring antipathy toward the plaintiff or plaintiff's position. Such employees may serve as a conduit to management and defense counsel regarding the investigation's objectives.
- A script permits the fact finder to testify to the uniformity of process employed during such contacts, and that all contacts were asked the same series of questions initially.
- A script helps insulate the fact finder from allegations about what the employee was or was not asked during the contact.

Keep the initial contact brief.

Be prepared to keep the initial contact with the employee brief until some sense of his or her point of view is obtained regarding the employer, the plaintiff, the workplace environment and the factual basis for the plaintiff's complaint. Stick to the script: employee responses to carefully crafted assessment questions will almost always tell you what you need to know about the employee's point of view, thereby identifying employees who should be further engaged and those who should be discarded.

Prolonging unfruitful communication with an employee or communication with one who is adverse to the plaintiff's position poses unnecessary risk to the investigation and its objectives. It may also help aggravate the workplace environment, thereby impacting other employees who may be contacted. The fact finder is encouraged to embrace the notion that effective use of the described methodology may involve contacts that last as little as five minutes.

Take notes documenting employee responses to the scripted questions.

Typically, the type of cold-call telephonic contact employed when using this method will not result in an on-the-spot recorded statement or an appointment for a declaration, nor should this be the initial aim of the contact. Instead, one should listen carefully to responses to the scripted questions. Make careful notes with liberal use of verbatim quotes contemporaneous with the contact. Think of note taking in this instance as being something akin to a stenographic procedure during which a record of the contact is created with emphasis upon the employee's responses to the scripted questions. Bear in mind the "survey" nature of the contact while documenting these responses.

Conclusion

When properly employed, the described methodology is a very effective tool for use in identifying which employees to engage in further examination while avoiding unnecessary or inadvertent disclosure of information.