

SOLUTIONS

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FORMER EMPLOYEES ARE FAIR GAME IN LITIGATION



One of the subjects on which commercial litigators are most frequently asked by their clients to offer advice is whether an adversary in litigation may contact former employees directly. Former employees are a tempting source of information in litigation due to the fact that they are occasionally disgruntled and eager to divulge information. But former employees are also an attractive source of information due to the lack of procedural safeguards that require a party to either

notify the former employer of the intent to make contact or to afford the former employer the opportunity to be present for the communication. Because the communications with former employees are, at least theoretically, without notice to the former employer, they can provide an avenue for discovery without (or with minimal) risk. If the former employee is helpful to his/her former employer, there is no record made of the communication and usually no follow up; if, on the other hand, the former employee has information that aids the adversary, the former employee's testimony can be memorialized in an affidavit and sprung on the former employer at a most inopportune time, such as in support of a dispositive motion.

Over the past several years, the courts have made an attempt to define the boundaries that determine how and when lawyers may communicate with former employees outside the presence of the employer's counsel. Employers who challenged such contact would maintain that such *ex parte* contact violated ethical rules, claiming that the "no-contact" rule applies to both current and former employees.

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TESTING AT-WILL EMPLOYEES FOR DRUG USE: AN UPDATE ON LAWS IN NEW ENGLAND

Drug use costs American businesses billions of dollars annually in lost productivity and health care costs. In response to this crisis, many employers, both public and private, are implementing workplace drug-testing programs. While employers regulated by federal law operate under a single standard to determine when, and under what conditions, employee drug testing is permitted, private employers must comply with the law of their home states – and private employers with multistate workforces are faced with the task of complying with potentially inconsistent laws of several states – when implementing employee drug-testing policies.

The Supreme Court has held that federally regulated drug testing and drug testing of state and federal public employees constitutes a search and seizure under the Fourth Amendment and is therefore permitted only when (1) there exists an "individualized suspicion" of drug use establishing probable cause to believe an employee is abusing drugs (so-called "probable cause" drug testing) or (2) there is a "special need" for random drug testing because an employee's job duties involve high-risk, safety-sensitive tasks.

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ATTORNEY SPOTLIGHT: PAMELA E. BERMAN



“LEARNING ALL ASPECTS
OF THE BROKERAGE
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A JURY WAS ONE OF THE
MOST REWARDING
EXPERIENCES I HAVE HAD
PRACTICING LAW.”

Pam Berman is a partner in the Boston office of Adler Pollock & Sheehan’s Litigation Department whose practice encompasses all aspects of civil litigation, as well as defending individuals and companies in federal criminal actions. Her primary areas of specialization are obtaining injunctive relief, especially in cases involving trade secrets, noncompetition and nonsolicitation agreements, and securities litigation.

Pam obtained her undergraduate degree from Wells College and her law degree from Cornell Law School. She started to practice law in Philadelphia in 1982 with Stradley, Ronon, Stevens & Young – a firm similar in size, then, to AP&S today. During her first five years of practice, Pam was fortunate to try many jury and nonjury cases, first together with her mentor, then on her own. Her Pennsylvania trial experiences culminated with her defense of Shearson Lehman Brothers in a six-week federal court criminal trial in which Shearson had been indicted in 63 counts of indictment for money laundering for a gambling enterprise. Fortunately, Shearson was acquitted on all counts. “The experience of learning all aspects of the brokerage industry and sharing that knowledge with a jury was one of the most rewarding experiences I have had practicing law. It whet my appetite for more cases involving securities dealers and employees, and was the beginning of my love of trying as many cases as possible to a jury.”

In 1987, Pam relocated to Massachusetts and became an equity partner in the Boston law firm of Choate Hall & Stewart. While there, she expanded her litigation practice to include the representation of banks handling distressed credit and workout situations, companies involved in commercial disputes that were targets of bad faith claims, and institutions concerned with copyright and trademark infringement, while continuing her defense of individuals and companies accused in federal criminal actions. In 2002, Pam joined AP&S, where she could more easily represent her clients while developing her litigation practice in the firm’s growing Boston office. According to Pam, “AP&S is a firm of outstanding attorneys and colleagues. It is rewarding to work together to serve the needs of our clients in a competitive economic environment.”

Pam dedicates much of herself to advocating for women’s issues – something that has been near to her heart since attending a women’s college and now as an active leader in the Women’s Bar Association of Massachusetts (WBA). Through her role on the board, and most recently as the president of the WBA, Pam fulfills her “commitment to women – both to those in the legal profession and business as well as to the poorest women and families – to work to advance and attain equal treatment.” Pam spearheaded an initiative to encourage more women and minorities to apply to become judges, as well as located resources available to guide them through the process.

Tireless in her commitment to continually improve the legal landscape for women and minorities, Pam was a natural choice to chair the AP&S Diversity Committee in developing a diversity initiative reflective of the firm’s commitment to increasing diversity within the firm and the community.

Pam’s enthusiasm for helping others is evident in her community as well; she is the president of the Canton Alliance for Public Education, an educational foundation supporting the Canton Public Schools. She is also a deputy general counsel to the Massachusetts State Democratic Committee, a position that she has held for more than 15 years.

FORMER EMPLOYEES ARE FAIR GAME IN LITIGATION *(continued from page 1)*



However, employers and lawyers alike should be aware that the courts have made it clear that the rules *do not* prohibit an adverse attorney from contacting former employees (or even some current employees for that matter) without notice to the company.

Rule 4.2 of the Massachusetts Rules of Professional Conduct is fairly typical of the limitations placed on a lawyer's communications, which are commonly referred to as the "no-contact" rule. It provides:

"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."

A plain reading of this rule reveals no prohibition from contacting former employees. The rule only prohibits a lawyer from making *ex parte* contact with a current or former employee whom counsel knows to be represented. Indeed, many jurisdictions limit the reach of the no-contact rule to *ex parte* contact with three categories of current employees whose interests are closely aligned

with the organization in the dispute: those agents or employees (i) who exercise managerial responsibility in the matter, (ii) who are alleged to have committed the wrongful acts at issue in the litigation, or (iii) who have authority on behalf of the organization to make decisions about the course of the litigation. Consequently, low-level current employees of a company can be contacted by adverse counsel without notice.

The judicial rationale behind failing to include former employees within the scope of the no contact rule is generally based on a "commonsense" reading of the rule. Whereas former employees were at one time, but no longer are, agents or employees of the company, it would be illogical to extend the protections provided under the rule to former employees.

The no-contact rule serves to protect an organization's attorney-client relationship by prohibiting *ex parte* communication with

third party and must refrain from using unfair or illegal tactics to obtain evidence. There are certainly practical aspects to permitting lawyers to communicate with former employees. At least one court has observed the following:

"Courts have long recognized that informal interviews are an exceptionally efficient means for the meaningful gathering of facts. They are generally more conducive to full disclosure and far less costly than the more structured processes of formal discovery. Former employees may be a useful source of meaningful information, because they may feel less directly tied to the employer's interests and therefore more willing to discuss informally what they know. It is important to keep in my mind that the no contact rule is designed to protect the attorney-client relationship, not the underlying facts."

What does this all mean for employers? Former employees are fair game in litigation and can prove to be a vital source of information for opposing counsel. While the boundaries will certainly continue to be refined over time, it is certainly something for employers to keep in mind when parting ways with an employee. There are

steps that employers can take to protect proprietary and confidential information of the company, including comprehensive employment agreements and confidentiality/nondisclosure agreements that carefully set forth what information a former employee can reveal and, if need be, protective orders to enforce those agreements. However, the prevailing trend of jurisprudence on this subject makes clear that employers must be mindful of information in the possession of former employees.

EMPLOYERS AND LAWYERS ALIKE SHOULD BE AWARE THAT THE COURTS HAVE MADE IT CLEAR THAT THE RULES DO NOT PROHIBIT AN ADVERSE ATTORNEY FROM CONTACTING FORMER EMPLOYEES (OR EVEN SOME CURRENT EMPLOYEES FOR THAT MATTER) WITHOUT NOTICE TO THE COMPANY.

employees who are so closely tied to the organization or the events at issue that it would be unfair to interview them without the presence of the organization's counsel. This is not true in the case of former employees.

While the no contact rule does not prohibit a lawyer from communicating with former employees of a represented company, there are other limits and standards to which counsel must adhere. For example, the rules of professional conduct in most jurisdictions provide that counsel conducting the *ex parte* interview must be truthful to the



Timothy P. Frawley practices in the Litigation Group and his experience encompasses complex commercial litigation, business litigation, contract interpretation and enforcement, and statutory compliance and fraud, as well as insurance defense and coverage.

TESTING AT-WILL EMPLOYEES FOR DRUG USE: AN UPDATE ON LAWS IN NEW ENGLAND *(continued from page 1)*



While private employees obviously are not protected by the Fourth Amendment, they do have the right to privacy. This has led states to fill the gap through regulation addressing when probable cause exists for employee drug testing and under what circumstances random testing is permissible. However, state laws vary concerning what factors may be used to make a determination of probable cause, whether a showing of job impairment is necessary, who may make such a determination, and whether and how such a determination must be documented and communicated to an employee. In light of the private right of action conferred upon employees under most state statutory schemes and the existence of common-law claims in states where no statutory scheme exists, private employers – particularly those with a multistate workforce – need to take a careful approach to the implementation of a workplace drug-testing program. What follows is a brief summary of each New England state’s approach to workplace drug testing.

Connecticut: In Connecticut, probable-cause drug testing is limited to circumstances where an employee’s drug use is likely to impair his or her job performance, and random drug testing is only permitted under narrow circumstances. Probable cause is statutorily defined as “a reasonable suspicion that the employee is under the influence of drugs so that it adversely affects or could adversely affect his or her job performance.” One court recently held that an employer in Connecticut is entitled to look at the totality of an employee’s behaviors in determining whether a reasonable suspicion of drug use exists, and need not show that each one of the employee’s behaviors would itself be sufficient to create reasonable suspicion. The Connecticut statute permits random drug testing of employees only (1) if the test is authorized under federal law, (2) if the employee performs a “high-risk or safety-sensitive occupation” as defined by the state Labor Commission, or (3) as part of an employee assistance program sponsored by the employer in which the employee voluntarily participates.

Maine: Maine’s drug-testing statute narrowly defines both probable-cause and random drug testing. Under this scheme, probable cause is “a reasonable ground for belief in the existence

of facts that induce a person to believe that an employee may be under the influence of a substance of abuse.” Although the statute does not tie probable cause to job impairment, it precludes an employer from relying upon certain types of evidence to make a probable cause assessment by providing that probable cause may not be based exclusively on any of the following: (a) information received from an anonymous informant; (b) information tending to indicate that an employee may have possessed or used drugs off duty, unless the employer actually observed such use or possession on or in the proximity of the employer’s premises during or immediately before working hours; or (c) a single work-related accident. The statute further provides that the probable cause determination may only be made by certain supervisory or medical personnel and that the person making the determination must state in writing the facts upon which the determination is made and provide a copy of the statement to the employee. Random testing is permitted only when approved as part of a collective bargaining agreement or where the employee’s work creates a threat to health or safety.

Maine also imposes several additional restrictions on employers by (a) requiring an employer to develop a written policy containing certain mandatory provisions before establishing a substance abuse testing program; (b) requiring employers with more than 20 full-time employees to have a functioning employee assistance program before establishing a testing program; (c) requiring an employer provide a copy of the written policy to an employee at least 30 days before it becomes applicable to the employee; (d) prohibiting any waiver or consent form regarding drug testing to be signed by an employee, and, perhaps most importantly; (e) requiring an employer to provide an employee who receives an initial confirmed positive test the opportunity to participate for up to six months in a drug rehabilitation program before the employer can take any action to discipline or terminate the employee.

Massachusetts: Massachusetts has not enacted any statutory scheme to address private workplace drug testing, and therefore Massachusetts employers enjoy wider latitude (but less certainty) in the implementation of drug-testing policies. The only guidance to Massachusetts employers regarding the implementation of a private workplace drug-testing program comes from the courts. The Massachusetts Supreme Judicial Court has twice addressed drug testing in the private workplace. In the first decision, *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, the court held that where employees were involved in manufacturing dangerous cutting tools, two employees had been arrested on drug charges, and a manager had smelled marijuana smoke and found marijuana cigarette butts on the premises, an employer’s implementation of a drug-testing program for all employees with procedural safeguards and after a 30-day notice period was reasonable. In the second decision, *Webster v. Motorola, Inc.*, the court held that the institution of a universal drug-testing program in which employees were selected by a computer that had been programmed so that each employee was tested at least once every three years, with similar

procedural safeguards as in *Folmsbee*, was valid when applied to a sales employee who regularly drove a company car, but invalid when applied to a technical editor. Based on these decisions, and on prior Massachusetts case law, it is likely that probable-cause testing will require a showing of an articulable suspicion of drug use, and that random drug testing will probably be upheld as valid only when applied to employees engaged in activities that affect public safety. Moreover, any policy must be reasonable in relation to the activities of the workforce and have procedural safeguards in place. Beyond that, the parameters of acceptable private workplace drug testing in Massachusetts remain largely undrawn.

New Hampshire: Like Massachusetts, New Hampshire has not enacted legislation regulating drug testing of private, at-will employees, and New Hampshire courts have yet to articulate standards for probable cause or random drug testing, leaving employers in that state with more flexibility in implementing workplace drug-testing programs. The Supreme Court of New Hampshire has implicitly recognized the validity of random drug testing in certain instances, by holding that an employer may refuse to reinstate an employee to a safety-sensitive position after the employee failed a random drug test despite a union's claim that the refusal to reinstate would constitute an unfair labor practice.

Rhode Island: Rhode Island's drug-testing statute ties the determination of probable cause directly to job impairment. It provides that probable cause exists where "[t]he employer has reasonable grounds to believe based on specific aspects of the employee's job performance and specific contemporaneous observations, capable of being articulated, concerning the employee's appearance, behavior or speech, that the employee's use of controlled substances is impairing his or her ability to perform his or her job." The statute does not permit random testing, except

to the extent it is authorized or mandated by federal law. Like Maine's statute, Rhode Island's statute (a) requires an employer to promulgate a drug abuse prevention policy before initiating testing and (b) requires an employer to refer an employee who receives an initial confirmed positive test to a substance abuse professional for assistance, although the employer may require ongoing testing and may terminate an employee whose testing indicates continued drug use during treatment.

Vermont: Vermont's drug testing statute permits an employer to require an employee to submit to a drug test when "the employer or an agent of the employer has probable cause to believe the employee is using or is under the influence of a drug on the job." The statute does not otherwise define probable cause or how it may be established. Similar to Maine, Vermont requires an employer to provide an employee who tests positive the opportunity to participate in a rehabilitation program before the employee may be terminated, although in Vermont the rehabilitation program cannot last longer than three months. Random drug testing is prohibited by Vermont's statute, except when such testing is required by federal law or regulation.



A resident in the firm's Boston office, **Richard M. Gilbert** is a partner in the Litigation Group, practicing complex civil and business litigation in state and federal courts throughout New England. He represents a broad range of clients, including large and small manufacturers, insurers, franchisors and franchisees, banks, partnerships, and individuals.

MASSACHUSETTS COURT UPHOLDS LIMITATION OF DIRECTOR INDEMNIFICATIONS

A recent decision by the United States District Court for the District of Massachusetts has far-ranging implications for corporations faced with the prospect of indemnifying directors for the costs of defending actions by regulators and private parties. In *Happ v. Corning, Inc.*, the Court validated an agreement to indemnify that required the director to provide the corporation with an undertaking to repay any sums advanced by the corporation in the event that the director was ultimately determined not to have been entitled to indemnification. Perhaps more important, it rejected the notion that the presence of ongoing litigation constitutes

economic duress sufficient to invalidate the director's undertaking.

In *Happ v. Corning, Inc.*, the director's indemnification agreement provided that the company would indemnify him against the costs of defending an action, so long as he had acted in good faith and in a manner he reasonably believed was not contrary to the best interests of the company. The director was accused of insider trading by the SEC. While the suit was in progress, Happ was required to sign the following undertaking, which was factually specific to the SEC charge:

"If it is finally determined that, in violation of Section 10(b) of the Securities Exchange Act of 1934 and/or Section 17(a) of the Securities Act of 1933, I wrongfully used material non-public information for personal gain either with intent or recklessly...then I undertake to promptly repay [Corning] for any and all costs of defense advanced."

The SEC won its case and was upheld on appeal. Corning demanded repayment for all monies advanced in defense of the case. The director claimed that, because the undertaking was factually specific and signed while the SEC suit was in progress,

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MASSACHUSETTS COURT UPHOLDS LIMITATION OF DIRECTOR INDEMNIFICATIONS *(continued from page 4)*

he had been under economic duress that invalidated his undertaking. The court held, however, that under Massachusetts law, a party must show that it was forced to enter into a contract through some unlawful or wrongful act or threat that deprived the party of "free will." There is no economic duress, according to the court, where one party simply takes advantage of another's financial difficulty or necessity. Thus, the director's undertaking was upheld and his obligation to repay the company for all monies advanced under the indemnification agreement was enforced.

The case is important to private and public companies and their directors because director indemnifications often come with a good faith caveat that can require undertakings with respect to repayment by a director that can be demanded during litigation and be factually specific to that litigation. At least in Massachusetts, it appears that those provisions will be upheld and the presence of ongoing litigation will not serve to relieve a director of his or her repayment obligations in the event the director is found to have acted in bad faith.



Willis H. Riccio leads the Security Law practice at AP&S, bringing firsthand knowledge and an extensive background of more than 45 years of experience as a securities litigation attorney, securities regulator, a law teacher and author, and administrator of the SEC and NASD.

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Editor:

Geoffrey W. Millsom, Litigation Group

ADLER POLLOCK & SHEEHAN P.C.

www.apslaw.com

One Citizens Plaza, 8th Floor
Providence, RI 02903-1345
401-274-7200

175 Federal Street
Boston, MA 02110
617-482-0600

800 Lake Street
Bristol, NH 03222
603-744-1021