

*Landmines in Litigation:
How Death, Divorce, & Other Events Affect
Pending Litigation*

Business

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Overview

- I. Who is the client?
- II. How do changes at a company affect CR 30(b)(6) considerations?
- III. How does the attorney-client privilege apply to current versus former employees?
- IV. How does turnover in employment affect client communication and witnesses?
- V. How does the sale of a business affect matured or unmatured claims?



I. Who is the Client? – RPC's

- RPC 1.13 – Organization as Client
- RPC 1.7 – Concurrent Conflicts of Interest
- RPC 1.8(f) – Compensation from Someone other than the Client
- RPC 5.4(c) – Professional Independence
- RPC 1.6 – Attorney-Client Privilege in Common Representation



I. Who is the Client? – Practical

- Step 1: Identify the underlying legal issue
- Step 2: Identify ownership structure, governing documents, and authority to act
- Step 3: Identify owners, directors, officers, and employees that may be involved in the litigation



II. How do changes at a company affect CR 30(b)(6) considerations?

Rule 30(b)(6): “A party may in a notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters known on which the deponent will testify...The persons so designated shall testify as to the matters known or reasonably available to the organization.”



II. How do changes at a company affect CR 30(b)(6) considerations?

- Duty – Designate and Investigate
- Knowledge Held by Existing Employees
- Knowledge Held by Former Employees
- Work Product & Attorney-Client Privilege Implications



III. How does the attorney-client privilege apply to current versus former employees?

- Protection for Current Lower-Level Attorneys under Certain Circumstances
- No Protection for Communications with Former Employees



IV. How does turnover in employment affect client communication and witnesses?

- Opposing Counsel can Communicate Ex Parte with Former Employees
- Attorney-Client Communications with Former Employees before Termination of Agency Relationship are Still Protected Subject to *Newman*
- Opposing Counsel can Communicate Ex Parte with Current Employees Who Do Not have Speaking Authority for Organizational Client
- Attorney-Client Communications with Low-Level Employees Who Do Not have Speaking Authority are Still Protected Subject to *Newman*
- Opposing Counsel cannot Communicate Ex Parte with Existing Employees Who Do have Speaking Authority



V. How does the sale of a business affect existing claims?

- Stock sale versus asset sale – Exclusions and Carveouts
- Indemnification agreement in stock sale
- Assignment of contractual rights and obligations
- Successor liability
- Availability of Recovery

