

More Light On The "No-Contact" Rule

BY ROY SIMON

Last month, my article described five recent court decisions construing the so-called "no-contact" rule, which is codified at DR 7-104(A)(1) in New York, and at Rule 4.2 in most other states. This month, I describe two additional cases decided in 2001, and two bar association ethics opinions issued in 2001. These all remind us that issues arising under the no-contact rule often require an analysis of other ethics rules, the rules of evidence, the principles of agency law, substantive criminal law, and limitations on judicial power to sanction attorneys who violate a Disciplinary Rule. They also remind us that these relevant bodies of law differ, sometimes sharply, from one jurisdiction to another.

Communicating with an Adversary's Current Employees

Two of the new cases arose out of the most puzzling issue under the no-contact rule: a lawyer's informal communications with an opposing party's current employees. An unusually helpful case on this point is *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 2001 WL 474149 (D.S.D. April 2, 2001), which comes out of the unlikely jurisdiction of South Dakota. In *Midwest*, two defense lawyers hired a private investigator (a former FBI agent) to go to a plaintiff's showroom and pose as a customer. His mission was to find out why one of the plaintiffs didn't carry Arctic Cat snowmobiles any more. He was also instructed to find out what another plaintiff's sales people were saying about Arctic Cat's competitors. The lawyers told the investigator to record the conversations. The investigator did as instructed, taking his wife and daughter along for "companionship and cover." The investigator and his wife soon engaged a salesman for plaintiff in a long conversation about snowmobiles, and also spoke at length with the principal of another plaintiff. The investigator recorded some of the conversations, reported to the lawyers who had hired him, and gave the tapes to the lawyers.

Eventually, plaintiff's counsel learned about the contacts and moved for sanctions on grounds that employing a private investigator to "manufacture evidence," to secretly tape-record conversations, and to seek admissions against plaintiff's interest for use at trial violated South Dakota's no-contact rule (which is like NY DR 7-104), as well as the rule obligating lawyers to supervise non-lawyers who work with them (similar to NY DR 1-104) and the rule prohibiting lawyers from using a non-lawyer to circumvent the rules (similar to NY DR 1-102). The court granted the motion by excluding from evidence "the audiotaped recordings made by the investigator, any testimony from the investigator, his wife and his daughter, and any other evidence obtained by the defense as a result of the audiotaped conversations." But the court said it would decide after trial whether to impose additional sanctions on the attorneys.

The court's post-trial opinion regarding sanctions is a feast for those interested in the many nuances of the no-contact rule. The court first summarized the many tests courts have developed to determine which employees may be informally interviewed and which may not:

the “**blanket**” test, barring all ex parte contact with current and former corporate employees; the “**scope of employment**” test, which prohibits contact with corporate employees about matters within the scope of their employment; the “**managing-speaking-agent**” test, which allows ex parte contact with corporate employees except for those who have legal authority (“speaking authority”) to bind the corporation in a legal evidentiary sense; the “**balancing**” test, which is applied case-by-case to determine the degree to which ex parte communication is necessary to reveal relevant information, the danger of generating admissions against the corporation that are admissible at trial under Federal Rules of Evidence 801(d)(2)(D), and the degree to which the effective representation of counsel requires corporate counsel to be present at employee interviews; and the “**control group**” test, which allows ex parte contact with all current corporate employees except the most senior management officials in the corporation’s “control group.” [Emphasis added.]

While evaluating these tests, the court spent considerable time analyzing the role of the hearsay rule’s definition of an “admission” in determining the scope of the no-contact rule. (The court rejected a New York case, *Quintana v. City of New York*, 686 N.Y.S.2d 408, 409 (N.Y. App. Div.1st Dep’t 1999), that had construed the hearsay rule’s definition of an admission very narrowly.) Ultimately, rather than adopting any of the tests just described, the court adopted the more refined holding of a West Virginia court, *Cole v. Appalachian Power Co.*, 903 F. Supp. 975, 977- 79 (S.D.W.Va.1995):

[C]ounsel or counsel's agent may not conduct ex parte interviews with five classes of an adversary corporation's or organization's current employees under Rule 4.2, unless counsel has the consent of the opposing attorney or is otherwise authorized by law to make such ex parte contact:

1. Current officials of the corporation or organization who have managerial responsibility;
2. Other current corporate or organizational employees whose act or omission in connection with the matter may be imputed to the corporation or organization for purposes of civil or criminal liability;
3. Those who are responsible for implementing the advice of the lawyers for the corporation or organization;
4. Any members of the corporation or organization whose own interests are directly at stake in a representation; and
5. An agent or servant of the corporation or organization whose statement concerns a matter within the scope of the agency or employment, which statement was made during the existence of the relationship and which is offered against the corporation or organization as an admission. However, ex parte interviews of employees who are "mere witnesses" to an event for which the corporation or organization is sued (i.e., holders of factual information), are permitted.

Applying these restrictions, the court decided that the contacts with the salesman violated the no-contact rule because they were "an attempt to elicit admissions against his employer, the Plaintiff." The court did

not impose sanctions for this offense, however, because the law had previously been unclear. But the court did impose sanctions because the interviews "took place under false pretenses," which is "clearly prohibited" by the rule on communicating with *unrepresented* parties. That rule, based on ABA Model Rule 4.3, provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Under that rule, which has no direct equivalent in New York, an attorney or investigator communicating with an unrepresented party must do the following:

(1) fully disclose his or her representative capacity to the employee, (2) state the reason for seeking the interview as it concerns the attorney's client and the employer, and (3) inform the individual of his or her right to refuse to be interviewed. The attorney or investigator shall not, under any circumstances, seek to obtain attorney-client or work product information from the employee.

The court next addressed the secret taping, an issue that often arises when interviewing witnesses. The court first noted, citing a South Dakota criminal statute, that it was "not illegal in South Dakota for one party to a conversation to record the conversation without the other party's knowledge or consent." Nevertheless, the court held that it was "unethical for an attorney or his investigator or other agent to record a conversation without the other party's knowledge or consent because such conduct involves deceit or misrepresentation. . . . [T]he undisclosed use of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor and fairness by which all attorneys are bound." (New York authorities are split regarding secret taping — compare *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 75 (S.D.N.Y.1993) (secret taping is not unethical) with N.Y. City Bar Op. 1995-10 (secret taping is unethical).)

The second new case arising out of informal interviews with current employees is *McCarthy v. Southeastern Pennsylvania Transportation Authority*, 2001 WL 347147 (Pa. Super. April 10, 2001). The plaintiff, an employee of SEPTA, was injured while unloading railroad timbers. She sued SEPTA, claiming that SEPTA had not provided proper equipment and had failed to provide sufficient manpower and adequate working conditions. Plaintiff's lead lawyer, Keller, sent an investigator to take statements from two current employees and one former SEPTA employee. SEPTA brought a motion in limine. The trial court, based on its reading of the hearsay rules regarding an "admission," orally ruled that the plaintiff could not use any of the three statements at trial. Despite this ruling, Keller sent the investigator to take statements from more witnesses. SEPTA complained to the judge again, and the judge was furious. He not only prohibited the plaintiff from using any of the statements at trial, but he disqualified the plaintiff's lead attorney and ordered his associate to try the case.

Plaintiff appealed, and a divided appellate panel held that the trial court had abused its discretion by disqualifying plaintiff's chosen counsel. The appellate court reasoned that the trial court did not have enough information to determine whether the communications with SEPTA's present and former

employees were prohibited by the no-contact rule. The appellate court relied heavily on the comment to Pennsylvania Rule 4.2, which states, in pertinent part, as follows:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The court interpreted the quoted comment as "instructing counsel to determine, *before* having ex parte contact with an employee, the position and nature of employment of that employee in regard to the possibility that a statement given by that employee and potentially admitted at trial could impute liability onto their employer." (Emphasis by the court.) However, the court found no precedent for importing the hearsay rule's definition of an "admission" into Rule 4.2. Rather:

The key information needed by the trial court to determine if an employee qualifies for protection from ex parte communication with opposing counsel is what status that employee has within the employee's organization, i.e., whether, by virtue of the employee's status, a statement made by this employee could impute liability to the company.

If the trial court had gathered enough evidence to conclude that any of the SEPTA employees who gave statements to Keller fit within this definition of a protected party for the purposes of the no-contact rule, then the trial court could properly have concluded that plaintiff's attorney violated Rule 4.2. However, the trial court did not adduce such evidence. Consequently, "the evidence in the record does not support a finding that the employees of SEPTA who had ex parte communication with Keller had managerial responsibility, were in positions within SEPTA such that their acts or omissions in connection to McCarthy's accident could impute liability onto SEPTA, or that their statements could be considered 'admissions' on the part of SEPTA." The appellate court therefore concluded that the trial court erred in removing Keller based on his purported violation of the no-contact rule, and it reversed—over a lengthy dissent—for a new trial.

Interviewing an Adversary's Former Employees

On March 29, 2001, the Virginia State Bar ethics committee issued Legal Ethics Op. 1749, which addressed questions about communications with former employees of a defendant corporation. The opinion specifically applied to employees who were outside the "control group" but who had been interviewed by the corporation's counsel in the course of his investigation. The inquiring attorney wanted to know whether he could ask unrepresented former employees (i.e., those without personal counsel) about "confidential communications" with the corporation's attorney or "induce" the former employee to disclose confidential communications when the disclosure "might subject the employee to civil liability" or when "the communications fall within the attorney-client privilege and pertain directly to the matters in litigation."

The ethics committee first made clear that Virginia, unlike some other jurisdictions, imposed no blanket ban on communications with an opposing corporation's former employees. Thus, former employees were not protected by Rule 4.2, even if they had communicated about the litigation with the corporation's counsel while they were still employed there. However, Rule 4.3, which is Virginia's equivalent to New

York's DR 7-104(A)(2), limited the content of an attorney's communication with unrepresented parties in two ways. First, Rule 4.3 "requires that the attorney identify his role in the matter and that the attorney provide no legal advice other than to obtain independent counsel." Second, Rule 4.3 prohibits the attorney from "seeking any information that may reasonably be foreseen as stemming from attorney-client communications."

Visiting the Opposing Party's Web Site

In January of 2001, the Oregon State Bar's ethics committee issued Formal Opinion No. 2001-164, entitled "Communicating with Represented Persons: Contact Through Web Sites." The committee was asked a simple question: May a lawyer access the web site of an opposing lawyer's client? The answer depended on the nature of the web site and the nature of the contact. The basic principle is that "if the contact would be prohibited in nonelectronic form, then it is prohibited in electronic form." Under this principle, merely viewing a web site or following links is "the equivalent of a newspaper" published by the opposing party for public consumption, and this "is not communicating with the represented owner of the Web site." Similarly, "one-way communication" from the visitor to the Web site, such as ordering products from the site, does not constitute communicating "with a person." Rather, it is "the equivalent of ordering products from a catalog by mailing the requisite information or by giving it over the telephone to a person who provides no information in return other than what is available in the catalog." However:

A more interactive Web site allows the visitor to send messages and receive specific responses from the Web site or to participate in a "chat room." A visitor to a Web site who sends a message with the expectation of receiving a personal response is communicating with the responder. The visitor may not be able to ascertain the identity of the responder, at least not before the response is received. In that situation, a lawyer visiting the Web site of a represented person might inadvertently communicate with the represented person. If the subject of the communication with the represented person is on or directly related to the subject of the representation, the lawyer violates DR 7-104.

The essence of the analysis under DR 7-104 is thus "whether the Internet-based communication has the character of a telephonic or face-to-face conversation." If it does, "it is also forbidden in any electronic format."

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