Ex Parte Interviews

Parley with employees of an adverse party

By Daniel N. Jabe

An issue frequently arising in corporate litigation is whether, and under what circumstances, lawyers for one party may interview unrepresented current and former employees of an adverse party. Generally lawyers may not communicate directly with opposing parties who are represented by counsel. Corporate counsel, therefore, might be tempted to make the blanket assertion that all current and former employees of the client are covered by the representation. Counsel should not take solace in this approach. The Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline, which issues informal, non-binding Advisory Opinions on legal ethics, recently rejected that idea out of hand as mere "bluster."[1] The Board also condemned it as "inappropriate." Counsel cannot bring the employees into the representation by unilateral declaration, and blanket representation would result, in many cases, in improper conflicts of interest.[2]

This issue has enormous implications for both sides. If the lawyer desiring to conduct interviews is too timid, opportunities to gather critical evidence may be missed. If, on the other hand, the lawyer is too bold, the result may be sanctions. For corporate counsel, a misapprehension of the extent to which the client's employees may be vulnerable to ex parte interviews also may have dire consequences not only for the case at hand, but also for the client relationship. Defensive action that is either too little or too late may unnecessarily expose the client, while action that is too aggressive may lead to sanctions.

Guidance regarding ex parte contacts with current and former employees of an adverse party may be obtained from three key sources: (1) the Ohio Code of Professional Responsibility and, in particular, the Disciplinary Rules; (2) the Board's opinions on legal ethics; and (3) Ohio state and federal case law. For a variety of reasons, the interaction between these sources is complicated. Courts, for example, are not bound by the opinions, but they often rely upon them as persuasive authority. The case law in this area is also quite limited. Fortunately, however, these sources are generally consistent and together provide a great deal of insight.

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The relevant Disciplinary Rule is DR 7-104, which states in relevant part: During the course of his representation of a client a lawyer shall not: 1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has prior consent of the lawyer representing such other party or is authorized by law to do so.[3]

As might be expected, the application of this rule to employees of an adverse party turns on whether the employees are current or former employees.

According to the Board, an ex parte interview with a current employee is inappropriate if the employee can speak for the corporation or commit the corporation to a position, on the theory that such an employee is effectively a party.[4] This prohibition includes employees who supervise, direct or regularly consult with the corporation's lawyers concerning the matter, who have authority to obligate the corporation with respect to the matter, or whose acts or omissions in connection with the matter may be imputed to the corporation for liability purposes. Interviewing lawyers may contact other current employees without notifying corporate counsel, although the Board has noted that, in close cases, obtaining permission from corporate counsel would be reasonable. At least one court has excluded evidence of conversations between an attorney-witness and employees of an adverse corporation obtained in violation of DR 7-104.[5]

In contrast, the Board has explained that an ex parte interview with a former employee is generally permissible without the notification and consent of corporate counsel because a former employee is not really a party.[6] However, the interviewing lawyer must meet certain conditions: the former employee must consent to the interview; if the former employee is represented by counsel, that counsel's consent must also be obtained; the interviewing attorney must inform the former employee not to divulge any communications with counsel; and the attorney must fully explain that he or she represents a client adverse to the corporation. The interviewing attorney must also be careful not to give the former employee any advice, other than the advice to seek counsel. Ohio courts on numerous occasions have considered the propriety of various ex parte contacts with former employees and have concluded that the contacts involved were appropriate.[7]

Ohio courts have approved of or required protections for current and former employees similar to those prescribed by the Board, generally explaining that interviewing lawyers should obtain the interviewee's consent and should also ensure, by appropriate disclosures, that the interviewee is aware, for example, of the nature of the litigation, the interests the lawyer represents, the possibility of seeking independent counsel, that participation in the interview is voluntary and may be terminated at any time, and that the interviewee should not disclose privileged or confidential information.[8]

One court has also indicated that the party conducting interviews must disclose to the adverse party the names of the interviewees to the extent that they are believed to have relevant information and also any specific information intended to be used at trial.[9] According to the court, the adverse party has an "unqualified right" to learn all the details of the evidence against it and to prepare in advance of trial to rebut that evidence.[10] However, another court has held that the broader demand that the interviewing party maintain and

disclose a list of all former employees contacted and all statements and notes from such contacts would invade that party's "zone of strategical privacy."[11]

Finally, while the Board's insight into the availability of sanctions for violations of DR 7-104(A) in this context is limited because it does not ordinarily address such issues, Ohio state and federal case law suggests that in addition to disciplinary proceedings, attorneys and their clients may suffer a variety of sanctions for conducting interviews that do not conform to the required rules and procedures. These sanctions may include preventing them from using the interviewees as witnesses, from using any information provided by the interviewees at trial or in an extreme case, dismissal of some or all of their claims with prejudice.[12] As more than one court has noted, however, the drastic remedy of disqualification for the offending attorney will be unavailable unless there is a showing of prejudice.[13] These non-disciplinary remedies are likely to be available even if the attorney involved is not admitted to practice in Ohio. The issue is not the Ohio Supreme Court's jurisdiction over the lawyer in a disciplinary proceeding, but instead what ethical standards the court will apply with respect to the proposed testimony of a witness before it.[14]

Thus, counsel engaged in corporate litigation should be aware that a lawyer may generally conduct ex parte interviews of both current and former employees of an adverse party, unless the current employees supervise, direct or regularly consult with the corporation's lawyers concerning the matter, have authority to obligate the corporation with respect to the matter or unless their acts or omissions in connection with the matter may be imputed to the corporation for purposes of liability. Counsel should also be aware, however, that the interviewing lawyer must follow certain initial procedures and make certain advance disclosures or run the risk of sanctions. Given the fragmented nature of the authority on this issue, caution is advised. Counsel should consult the case law in their jurisdiction before committing to a position. The better informed the lawyers for both sides are about these issues, the more likely they can be appropriately addressed.

1. *Ohio Sup. Ct. Bd. Commrs. Grievances & Discipline, Op. 05-3 (2005).*
2. *Id.*
3. *Ohio Code of Professional Responsibility, DR 7-104(A)(1).*
4. *See Ohio Sup. Ct. Bd. Commrs. Grievances & Discipline, Op.90-20 (1990), Op. 05-3 (2005).*
5. *See Insituform of N. Am., Inc. v. Midwest Pipeliners, Inc.*, 139 F.R.D. 622 (S.D. Ohio 1991).
6. *See Ohio Sup. Ct. Bd. Commrs. Grievances & Discipline, Op.96-1 (1996).*
7. *See Summers v. Rockwell Int'l Corp., Case No. C2-92-301, 1993 U.S. Dist. LEXIS 21173 (S.D. Ohio April 9, 1993); Huther v. Mac Tools, Case No. C2-92-737, 1993 U.S. Dist. LEXIS 21234 (S.D. Ohio August 11, 1993); U.S. v.Beiersdorf-Jobst, Inc., 980 F. Supp. 257 (N.D. Ohio 1997); Davis v. Washington County Open Door Home, Case No. C2-98-636, 2000 U.S. Dist. LEXIS 20007 (S.D. Ohio Sept. 21, 2000); Johnson v. Ohio Dept. of Youth Services, 231 F. Supp. 2d 690 (N.D. Ohio 2002).*
8. *See, e.g., Huther, 1993 U.S. Dist. LEXIS 21234; Summers, 1993 U.S. Dist. LEXIS 21173; Davis, 2000 U.S. Dist. LEXIS 20007.*
9. *See Huther, 1993 U.S. Dist. LEXIS 21234.*
10. *Id.*
11. *Beiersdorf-Jobst, 980 F. Supp. 257.*
12. *See Summers, 1993 U.S. Dist. LEXIS 21173.*
13. *See The White Family Cos., Inc. v. Dayton Title Agency, Inc., 284 B.R. 238 (S.D. Ohio 2002); Kitchen v. Aristech Chem., 769 F. Supp. 254 (S.D. Ohio 1991); Smith v. The Cleveland Clinic Found., 151 Ohio App. 3d 373 (Cuyahoga Cty. Ct. App. 2003).*
14. *See Insituform of N. Am., 139 F.R.D. 622.*

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