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# Federal Judge Eases Restrictions On Ex Parte Corporate Contacts

By Henry Gottlieb

In a pro-plaintiffs decision on ex parte contacts, a federal judge ruled Tuesday that litigators gathering evidence against companies don't have to determine, *before* contacting employees, that the workers are ethically off limits to such approaches.

Nor must lawyers follow an exact script, in their initial approaches to such workers, to ensure that the employees are fair game for an interview.

U.S. District Judge Nicholas Politan's ruling, in *Derek Andrews v. Goodyear,* Civ. -98-2895 (NHP), is the first definitive interpretation of 1996 rules governing New Jersey lawyers' ex parte contacts with current and former employees of opponent companies, says Patricia Barasch, who argued for the amicus National Employment Lawyers' Association/New Jersey.

The issue was whether Princeton solo practitioner Glenn Bergenfield should be disqualified as counsel to a group of black workers suing Goodyear Tire & Rubber Co. Inc. for alleged discrimination at a New Brunswick auto parts warehouse.

In a September 1998 telephone call after filing the suit, Bergenfield obtained what appeared to be damaging information from Lawrence Guffey, a Goodyear zone manager. But when the corporation's lawyers found out about the conversation, they cried foul.

Under the revised Rules of Professional Conduct 4.2 and 4.3, lawyers cannot try to elicit information from an employee without a diligent effort to find out whether the worker is represented by counsel or is part of the company's litigation control group.

**WHAT DILIGENCE DUE?: Goodyear lawyers cried foul against Glenn Bergenfield for not making enough of an effort to find out whether a worker he called was represented by counsel or was part of the company's litigation control group.**

But what constitutes a diligent effort?

In an attempt to answer that question, U.S. Magistrate Judge Ronald Hedges last February disqualified Bergenfield on grounds that the rules require lawyers to make sure — before making contact with the employee — that the employee is not represented or is not part of a litigation control group.

But that interpretation, Bergenfield and his colleagues in the employment bar argued on appeal to Politan, meant that lawyers could never talk to an employee without first tipping off the bosses about the impending contact. And that's not what the framers of the ex parte rules intended, Bergenfield argued.

Politan agreed. "Nowhere in RPC 4.3 is there an obligation to secure any of this information before initiating contact with a potential witness," the judge wrote.

To be sure, at the outset of such conversations, lawyers must make thorough inquiries to satisfy themselves that the lawyer isn't represented or is part of the litigation control group, Politan said. In addition, the attorneys can't imply they are disinterested. They must be up front about their role in the case.

Even so, it's not as if a lawyer has to be like a police officer reading from a Miranda rights card. The judge said, "Bergenfield was not obligated to follow an exact script when speaking with Guffey."

If that were the case, the committee that drafted the revised rules would have suggested such a catechism, Politan suggested.

"Furthermore, it is simply impractical to suggest, as Goodyear does, that every attorney, seeking to determine if a current employee of an organization is represented, is required to read in robot-like fashion from the same script," the judge said.

"In fact, this Court believes such a requirement would seriously hinder an investigation by an attorney into the merits of the case," Politan added, though he did say there should be a general format that attorneys should use to ensure they are on sound ethical footing.

Because of a gag order on the main counsel in the case, there was no comment last week from Bergenfield and Goodyear's lawyer, Marilyn Sneirson, a partner in the Newark office of Pittsburgh's Reed Smith Shaw & McClay. Besides, they were busy last week in lengthy depositions of Bergenfield's clients, a dozen warehouse workers who claimed they were ridiculed and denied promotions and benefits because they are black. The company says the charges are false.

Thomas Campion, a partner at Morristown's Drinker, Biddle & Shanley who argued for an amicus, the New Jersey

Corporate Counsel Association, said he couldn't comment until he talked to his client.

But Barasch, his rival amicus in the plaintiffs' bar, says the 67-page opinion, because it analyzes the tortured history of the ex parte requirements and their revision in New Jersey in great detail, is now the definitive interpretation of the rules.

The revised rules were promulgated after a decade of confusion over the issue and are designed to strike a balance among lawyers' rights to prepare their cases, their duty against unethical manipulation of lay witnesses and their encroachment on an adversary's privileges.

Barasch , a partner in Cherry Hill's Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jacoby & Graziano, says the decision enforces the purpose of the 1996 revision: ensuring broad access to employees of defendant companies within ethical bounds. Even better, it will stop corporate lawyers who have tried, absent a definitive interpretation, to limit fact-gathering by plaintiffs' lawyers.

"The significance of this decision is it will finally put to rest efforts by defense counsel to block access to employees of defendant corporations," Barasch says.

**Sloppiness Notwithstanding**

In a sense, though, the opinion stands as a warning to both sides. Plaintiffs' lawyers shouldn't be sloppy — as Politan said Bergenfield was — in interviewing the potential witness to ensure compliance with the rules.

According to Politan, nothing in Bergenfield's own certification showed that the lawyer specifically asked Guffey if he was represented or told Guffey he had a right to representation.

"His method is certainly not one that should be followed by others," Politan ruled.

As it turned out, Guffey was neither represented nor part of a litigation control group at the time Bergenfield called. "For sloppiness alone," the judge concluded, "this Court will not disqualify Bergenfield."

Politan had a few rough words for Sneirson as well, in the context of what happened after Bergenfield's conversation with the potential friendly witness, Guffey.

According to the pleadings, Bergenfield had found out through conversations with his clients and a disgruntled ex-Goodyear manager that Guffey had evidence supporting the plaintiffs' claim. Even better, Guffey had written an incriminating memo and might even be willing to help the plaintiffs. So Bergenfield called.

The lawyer said later that he even had a photocopy of RPC 4.3 in front of him when he called, told Guffey who he represented and said he didn't have to talk. Bergenfield said he also asked Guffey whether he had a lawyer. Not only did Guffey have no lawyer, he was waiting for Bergenfield's call with the incriminating memo at his fingertips, Bergenfield certified.

In a deposition in the ethics dispute, however, Guffey gave a different story. He wasn't waiting for Bergenfield to call; he was watching a ball game and just happened to have his memo in front of him.

During Guffey's deposition, Sneirson refused to let him testify about why he had the memo with him, which was "objectionable behavior on the part of Sneirson," Politan wrote.

In addition, though the judge said he didn't want to suggest Goodyear lawyers did anything unethical, he concluded that it was possible that Guffey was intimidated after speaking with Goodyear's attorneys.

It's "highly coincidental" that Guffey's story differed so sharply from Bergenfield's after the Goodyear lawyers got involved, the judge said. ■