Interviewing Former Corporate Employees

HOW TO

In Michigan, like many states, one of the most litigated, contentious, and murky areas of professional conduct concerns efforts by attorneys to communicate with a party who may be represented in the matter by another lawyer. Motions on this issue reveal much hair splitting and argument concerning whether an employee had managerial responsibilities, was within a litigation control group, was exposed to privileged information, was an agent of the employer, or could bind the employer by his or her statements. Recent cases and ethics opinions show a trend toward allowing attorneys greater freedom to conduct ex parte interviews with former employees.[1]

Smith v Kalamazoo Ophthalmology

In this context, a Michigan federal court recently held that an attorney could hold an ex parte interview with a doctor's former personnel manager concerning an employment dispute involving another employee, even though the manager had supervised that employee and dealt with the doctor's attorney concerning that dispute.[2]

The court provided a roadmap for attorneys who want to conduct ex parte interviews with former employees without risking sanctions or disqualification. Specifically, the court advised that an attorney seeking this kind of interview should notify the opposing attorney of his or her impending meeting with the former employee to allow the other party an opportunity to seek a protective order limiting the scope of the ex parte interview to non-privileged information.

AVOID RISKING DISQUALIFICATION OR SANCTIONS

By John B. Spitzer

FAST FACTS

In considering the purposes and scope of rule 4.2, the court noted that "neither the text of the rule nor the comment indicates whether the proscription against contacts with an organizational adversary's employees extends to former employees."

Attorneys representing employees may wish to anticipate any employer attempts to restrict or limit interviews of former employees.

The court discussed cases suggesting that courts in other states might further restrict or limit any such interview if the employee knows or possesses employer trade secrets or confidential information.

In this case, Smith was a former employee of a physician and served as the office personnel manager. She alleged that the defendant reduced her working hours and her job duties. She also claimed that the defendant "thereafter hired much younger employees to perform job functions with which Smith had more experience and could have performed and that Defendant outsourced payroll work which Smith could have performed."

Smith filed a complaint with the Michigan Department of Civil Rights and a charge of discrimination with the Equal Employment Opportunity Commission, claiming age discrimination. She later filed suit claiming violations of federal and state law.

Smith's attorney, William F. Piper, interviewed Anne Marie Salliotte. "Salliotte was the office administrator from approximately March 2000 until May 2002 . . . [and] was responsible for overseeing the day-to-day business operations of Defendant, including its accounting, payroll, and, after May 2001, its personnel functions . . . . From May 2001 to May 2002, Smith reported to Salliotte." The employer's attorney, James B. Thelen, conferred with Salliotte on 12 occasions to discuss and provide legal advice regarding the reduction of Smith's hours and the employer's response to Smith's administrative complaint. Piper informed attorney Thelen that he wanted to depose Salliotte, who knew certain confidential information concerning the dispute between Smith and her employer. Thelen informed Piper that Salliotte was a party to attorney-client communications and that he would assert the attorney-client privilege and seek a protective order as to any such discussions.

"Sometime shortly thereafter Thelen contacted Salliotte and informed her that Piper wanted to depose her . . . . Thelen indicated that Salliotte would be willing to appear for a deposition and requested that Piper contact him to arrange a date for the deposition . . . . According to Thelen, Piper never provided a deposition date or issued a deposition notice, nor did he respond to Thelen's assertion of the privilege or give Thelen notice that he intended to have ex parte contact with Salliotte . . ." But according to Piper, Thelen agreed to set up a deposition date, but never got back with him. Piper also claimed that he told Thelen that he disagreed with Thelen's view on the issues of privilege and the propriety of ex parte contact with Salliotte.

Piper claimed that Salliotte initiated contact with his office, spoke to him concerning the employment dispute, and that he informed her that her conversations with her former employer's attorneys were off limits. Salliotte signed an affidavit reflecting the information she gave to Piper at the interview.

In determining the propriety of Piper's ex parte interview of Salliotte, the court reviewed Michigan's Rule of Professional Conduct 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." In considering the rule's purposes and scope, the court noted that "neither the text of the rule nor the comment indicates whether the proscription against contacts with an organizational adversary's employees extends to former employees." Nevertheless, the court found that neither the rule nor the comments to it could be reasonably interpreted to apply to former employees, because they cannot bind the employer by their statements.

The court discussed precedents pointing out the reasons why counsel should be able to interview an organization's former employees without the restrictions applicable to counsel interviews of represented parties. Specifically, the ethical dangers those restrictions are designed to prevent generally do not arise in ex parte interviews of former employees: a former employee generally no longer works on the organization's behalf, is usually not represented by the organization's counsel,[3] and is unlikely to be a participant in the process leading to resolution or settlement of the dispute.

The court expressly declined to follow a State Bar of Michigan informal ethics opinion, which had concluded that rule 4.2 "prohibits ex parte contact where the former employee 'is privy to privileged information.'"[4] Instead, the court relied on a more recent opinion of the American Bar Association Committee on Ethics and Professional Responsibility. That Committee determined that rule 4.2 does not apply to former employees. While noting that some states substantially limit ex parte interviews, and that some ethics opinions strike a different balance between the need for attorney access to witnesses and the goal of preventing undue influence or attorney manipulation of witnesses, the court found that the ABA position reflects the majority position of state courts.

The court determined that because Salliotte was not an agent of her employer, she

could not be a party and had no connection to the organization that could reasonably place her in the role of a party. Nevertheless, the court cautioned that counsel could not seek, discuss, or use any privileged information available to Salliotte. Accordingly, the court concluded that although Smith's attorney could conduct an ex parte interview with Salliotte, he could be sanctioned if further discovery proceedings revealed that he had inquired into areas subject to attorney-client privilege or work product doctrine protection.

Likely Employer Responses to *Smith*

Although the court did not address foreseeable steps that employers may well take to prevent the type of ex parte interview that occurred in this case, employment attorneys should be alert to the predictable consequences that may result from this decision: Employers may insist that employees sign confidentiality, nondisclosure, or nondisparagement agreements as consideration for their hiring, continued employment, increases in salary, or receipt of severance benefits on termination.

These agreements may purport to limit a current or former employee's disclosure of information concerning the employer's activities or the employee's work-related conduct to disclosures made pursuant to subpoenas, government investigations, or employer inquiries. For example, if the former employee, in this case Ms. Salliotte, were subject to a properly drafted nondisclosure or nondisparagement agreement, she would put herself in legal jeopardy even by speaking with the fired employee's attorney.

Moreover, even if she merely said "subpoena me" to an attorney who was contemplating action adverse to the employer, or if she let it be known that she would be available to testify concerning the conduct of her former employer, she could breach the following provision of her hypothetical agreement: "Employee shall not in any way advocate, assist, contribute to, encourage, facilitate, foment, fund, join, or participate in litigation or other action against her former Employer unless (1) Employee's action is taken pursuant to subpoena or court order; or (2) Employee receives Employer's prior written consent to assist, cooperate, testify, or otherwise participate in any type of action . . . ." And even if a court would ultimately find this type of provision to be unenforceable, a reasonable employee could fear that her being in any way involved in an action against her former employer might complicate or jeopardize her current employment or lead to legal action against her. Perhaps it is for this reason that these types of provisions are sometimes referred to as "in terrorem" clauses.[5]

Attorneys representing employees should take the initiative in seeking court approval before interviewing former employees who possess confidential information.

Future litigation may develop along the lines of that ongoing with respect to decisions concerning other employment-related covenants.[6] That is, particular states may develop markedly different interpretations regarding the reasonableness, fairness, scope, duration, and ultimate enforceability of these agreements.

Representing Employees: Attorney Strategies

Attorneys representing employees may wish to anticipate any employer who attempts to restrict or limit interviews of former employees. For strategic purposes, the employee's attorney could file a motion to interview witnesses soon after the complaint is filed. In that way, the employee's attorney gains the strategic advantage of being the moving party.[7]

Secondly, in drafting a motion to interview witnesses, attorneys for employees could emphasize the need for counsel to interview former employees informally to zealously represent their clients. In many cases, counsel could justifiably argue that the employees would be more truthful if not subject to the constraints, formality, and possible chilling effect that a deposition atmosphere might impose.

Finally, employees could fear retaliation or loss of their current employment if their former employer became aware of their support for a lawsuit against the former employer. To protect former employees, counsel drafting a motion to interview witnesses could request that the court order that the former employer take no steps to threaten, coerce, intimidate, or otherwise punish the former employees for their cooperation with plaintiff's counsel or their subsequent testimony.

Lessons for Michigan Lawyers

The lessons of *Smith v Kalamazoo Ophthalmology* are clear: Attorneys representing employees should take the initiative in seeking court approval before interviewing former employees who possess confidential information. Second, at the very least, the employee's attorney should give opposing counsel written notification that he or she plans to conduct ex parte interviews of former employees. Lastly, before interviewing former employees, counsel must determine whether those employees are subject to any confidentiality, nondisparagement, nondisclosure, or other employment agreements. ◆

The views expressed in this article are those of the author and not necessarily those of The American Law Institute or The American Bar Association.

John B. Spitzer is an Assistant Director for the American Law Institute-American Bar Association Continuing Professional Education. He writes a regular column concerning the law governing lawyers for ALI-ABA's magazines, and has law practice experience in the areas of arbitration and workers' compensation.

Footnotes

1. See Ellen J. Messing and James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View,* 19 Lab. Law. 353, 362–374 (2004).
2. *Smith v Kalamazoo Ophthalmology,* 2004 US Dist. LEXIS 8578 (WD Mich April 21, 2004).
3. *A. v Duncan,* 2004 US Dist. LEXIS 26976 (D Mont, July 30, 2004) (an employer's attorneys cannot create an attorney-client relationship with current or former employees by simply sending a notice of representation to those employees).
4. Mich. Prof'l & Judicial Ethics Comm. Informal Op. R-2 (Apr. 21, 1989).
5. See Black's Law Dictionary 825 (West Group, 1999).
6. See David J. Carr, *Ten Traps To Avoid In Drafting Enforceable Confidentiality, Non-Compete, and Non-Solicitation Agreements (with Form)* 50 The Practical Lawyer 33 (August 2004); Mary E. Bruno, *Some Basics About Employment Agreements,* 50 The Practical Lawyer 45, 51–58 (August 2004).
7. See *Sharpe v Leonard Stulman Enters Ltd Pshp,* 12 F Supp 2d 502 (D Md 1998) (defendant's motion in limine to prevent witness interviews was denied and plaintiff's motion to interview witnesses was granted; attorneys could interview former employees in housing discrimination case).