

Ex Parte Interviews of Opposing Party's Employees Are Permissible Pursuant to SJC Ruling

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In Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, the Supreme Judicial Court interpreted the existing ethical rules with respect to *ex parte* interviews of an opposing party's employees. The Court's holding explicitly rejected a widely held view that considered interviews of an adverse party's employees without representation of counsel to be improper. The decision will permit a plaintiff to conduct extensive informal discovery from a broad class of an opposing party's employees without notice to the opposing party. The holding will benefit plaintiffs in many cases and complicate the defense of many of the same.

In 1998, the Supreme Judicial Court adopted Rule 4.2 from the American Bar Association (ABA) Model Rules of Professional Conduct. Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The official commentary to the Rule provides that an attorney may not speak to three categories of employees of an adverse party: 1) persons having managerial responsibility on behalf of the organization concerning the subject matter of the representation; 2) persons whose conduct may be imputed to the organization for purposes of civil or criminal liability; and 3) persons whose statement may constitute an admission on the part of the organization. Thus, the comment precluded an attorney from contacting employees of an organization to discuss any subject within the scope of their employment. As previously construed, the Rule

provided extensive protection to corporations regarding interviews of employees concerning pending lawsuits and claims.

In Messing, the law firm of Messing, Rudavsky & Weliky, P.C. (“MR&W”), filed a complaint against Harvard College with the Massachusetts Commission Against Discrimination on behalf of its client, Kathleen Stanford. Stanford alleged that Harvard discriminated against her on the basis of her gender and in reprisal for earlier complaints of discrimination. MR&W conducted interviews of five of Harvard’s employees outside the presence of Harvard’s counsel and without prior notice to Harvard. Two of the employees had supervisory authority over Stanford, but none was directly involved in the alleged discrimination or retaliation against her. Furthermore, none of the employees exercised management authority with respect to the allegedly discriminatory acts.

Harvard filed a motion seeking sanctions for violations of Rule 4.2 after learning of the interviews. A Superior Court judge found that MR&W violated Rule 4.2 and prohibited MR&W from using the affidavits it had procured at trial. The Court also awarded attorney’s fees and costs against MR&W in the amount of \$94,418 to reimburse Harvard’s litigation costs arising from the dispute.

In overruling the Superior Court’s decision, the Supreme Judicial Court expressly rejected the comment to Rule 4.2 as being overly protective of corporations and too restrictive to an opposing party’s ability to contact employees of an adversary organization.

The Court specifically addressed the third class of employees addressed in the official commentary and held that the rule banned contact only with employees of a corporation who have the authority to commit the organization to a position regarding the subject matter of representation. Thus, with respect to the third class, contact is only prohibited as to those employees with authority to make decisions about the course of the litigation, such as when to initiate suit and when to settle a pending case. In so ruling, the Court recognized its retreat from the broad prohibition on employee contact endorsed by the official commentary to the Rule.

In light of the holding, contact is now prohibited only as to: (1) those employees who have managerial responsibility in the matter; (2) those who are alleged to have committed the wrongful acts at issue in the litigation; and (3) those who have authority to make decisions about the litigation. The Court reasoned that the revised interpretation of the rule will protect the attorney-client relationship and continue to prevent clients from making ill-advised statements without the counsel of their attorney while permitting a litigant to obtain a more meaningful disclosure of the truth by conducting informal interviews with employees of the opposing organization. In so ruling, the Court acknowledged that the decision may result in increased litigation to define more particularly which employees fall within the protection of the revised rule.

The Messing decision is likely to have more significant ramifications to a defendant corporation than the additional litigation expenses acknowledged by the Court. As noted by

the dissenting opinion, the “no contact rule” was designed to ensure the effective assistance of counsel by preventing employees from making ill-advised statements that are potentially detrimental to the corporation. While the “low level” employees may be viewed as merely witnesses to the allegations, their statements may in some circumstances serve as vicarious admissions against the corporate defendant. In all cases, these employees will have inside information about the company that skilled lawyers will use to their advantage.

The Messing decision will be a powerful weapon for plaintiffs prosecuting workplace discrimination claims. Plaintiff’s counsel may identify disgruntled employees and “poison the well” by conducting suggestive interviews with leading questions that lead to incriminating statements against management. As in the Messing case, the plaintiff may indeed obtain affidavits from key employees that may be used as vicarious admissions against the company.

In defending such cases in the future, counsel must aggressively identify all witnesses from whom statements have been taken. Employers should counsel their employees to notify management immediately when asked for an interview by a complainant’s counsel regarding their employment. Employers should also conduct a thorough internal investigation to obtain statements from all of their own employees who may have discoverable information concerning a claim. A proactive approach in the early stages of investigation will limit the potential for surprise later in the litigation.