EX PARTE COMMUNICATIONS IN RAILROAD LAW CASES

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Fact development through *ex parte* communications with employees of a defendant railroad company: Model Rule of Professional Conduct 4.2, Federal Rule of Civil Procedure 11, and Federal Employer's Liability Act § 60.[1]

I. Introduction

The Federal Employers' Liability Act[2] (hereinafter FELA) was passed by Congress 100 years ago to cover railroad workers injured on the job in the course and scope of their employment for the carrier in interstate commerce.

A little over three decades after its passage, the 76th Congress in its first session in 1939 in further supporting the FELA proclaimed:

> "In relation to the investigation of facts upon which claims for injuries are based, humanity and justice demand that injured railroad men be accorded as much freedom of action as their employers enjoy."[3]

As we sit here today these words and the intention of Congress regarding this federal legislation mean even more than it did almost 70 years ago when Congress demanded that railroads refrain from handicapping their injured employees from finding out the facts of their accidents and injuries as observed by their fellow workers.

Ex Parte interviews with railroad witnesses are not only authorized by the FELA but absolutely necessary to properly represent a plaintiff railroader. It means a lawyer is doing his or her job investigating a case. Specifically, Section 60 of the Federal Employers' Liability Act (hereinafter Section 60) was enacted to equalize the playing field for railroad employees against railroad employers who disseminate rules prohibiting employees from giving information

[1] Portions of this paper were first presented at the ATLA 1997 Annual Convention, San Diego, California 1997.
[2] 45 U.S.C. § 51, et seq.
[3] S.Rep. No. 661, 76th Cong., 1st Sess. 5 (1939). *See also, Pratt v. Nat'l R.R. Passenger Corp.*, 54 F. Supp. 2d 78 (D. Mass. 1999).

concerning an accident to anyone except certain specified company officials and claim agents.[4]

Unfortunately today, in some conservative jurisdictions, an unfair practice is developing where some railroad defense counsel are trying to limit the right of plaintiff's counsel to interview rank and file fact witnesses that work for the railroad. These conservative jurisdictions manipulate the plain language of Model Rule of Professional Conduct 4.2 and the type of legal authorization it anticipated to undermine the preemptive effect of Section 60!

This updated paper will discuss this tactic and why it should be given no safe harbor.

II. The Need for an Investigation

A basic tenet of legal representation is the reasonable investigation into the legal and factual claims of one's clients. This basic principle is embodied in Federal Rule of Civil Procedure 11, by which lawyers are mandated to conduct such a reasonable investigation.[5] The language of FRCP is clear:

> "By presenting to the court any paper, an attorney… is certifying to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the allegations and other factual contentions have evidentiary support."[6]

The failure to conduct such an investigation may expose the lawyer to sanctions. Clearly, any such investigation must be conducted within the bounds of law and ethical conduct. The obligation to investigate necessitates informal access to witnesses, provided the witness is willing. These initial interviews allow the lawyer the opportunity to verify that there is an evidentiary basis for his or her client's claims or to discover other avenues which may lead to such evidence.

In FELA cases, most of the factual evidence lies in the hands of the employees of the railroad companies. Therefore, these employees are the individuals who have the information needed to verify his client's claims. The tension between FRCP 11 and the restrictions on *ex parte* communications under ethical rules, as impacted by the 1939 amendment to FELA, leave in question the ethics of a plaintiff lawyer conducting *ex parte* interviews.

III. Model Rule of Professional Conduct 4.2

ABA Model Rule of Professional Conduct 4.2 (hereinafter Rule 4.2) places certain limits on investigations by lawyers. It prohibits lawyers from communicating with a represented person

[4] Id.
[5] Fed. R. Civ. P. 11
[6] Id.

without the consent of the other lawyer, unless authorized by law to do so. Specifically 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.[7]

Under Comment 7 of Rule 4.2, in the case of a represented organization, such as a railroad company, the Rule prohibits the lawyer opposing the organization to have *ex parte* communications in two separate instances. First, the lawyer opposing the railroad in this instance cannot communicate *ex parte* with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter. Second, the lawyer cannot communicate with a constituent whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Before the amendment to Rule 4.2 and its Comments in 2002, the original Comment 7 to Rule 4.2 stated the Rule 4.2 prohibits communication with any person "whose statements may constitute an admission of the part of the organization." However, in the 2002 revision, the American Bar Association removed the prohibition detailed in Comment 7 because the prohibition was "broad and potentially open-ended" and "had been read to prohibit communication with anyone whose testimony would be admissible against the organization as an exception to the hearsay rule."[8]

Additionally, it must be remembered, under Federal Rule of Evidence 801(d)(2)(D)[9] (hereinafter FRE 801), an employee's statements constitute an admission against the employer so long as it concerns a subject within the scope of the employment during the existence of the employment. Before the revision to Rule 4.2, FRE 801 left few employees outside the purview of Rule 4.2 and limited the investigation to the formal discovery process. However, with the latest amendment to Rule 4.2, and new Comment 7, **defendant railroads can no longer use the argument that FRE 801 and Rule 4.2 coexist to prohibit *ex parte* communications with any employee who could bind the railroad in a legal evidentiary sense.** It is clear from the amendment to Rule 4.2 that the ABA never intended the Rule be used to prohibit ex parte communication with every employee whose statement would be admissible in evidence under FRE 801.[10] The amended commentary reflects the ABA's intention that Rule 4.2 not be interpreted as barring *ex parte* contact with any employee whose admission could be used

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[7] Prior to 1997, the Model Rule used the word "party" rather than "person." Some states have adopted this change whereas others have not. The modification of this Rule by changing the word "party" to the word "person" sought to make it clear that the Rule applies to a broader class than just parties to the litigation. *Weider Sports Equip. Co. v. Fitness First, Inc.*, 912 F.Supp. 502, 506 (D.Utah 1997).

[8] See Am. Bar. Ass'n, Annotated Model Rules of Professional Conduct 4.2 (5th ed. 2003). An example of this overly broad interpretation of Rule 4.2 as cited by the ABA is *Weeks v. Independent School District No. I-89*, 230 F.3d 1201 (10th Cir.2000).

[9] Federal Rules of Evidence, 801(d)(2)(D), 28 U.S.C.A.

[10] See Am. Bar. Ass'n, Annotated Model Rules of Professional Conduct 4.2 (5th ed. 2003).

against the organization or company. The true objective of Rule 4.2, according to the commentary, is to prevent *ex parte* communication with an individual who is speaking with the authority to bind the company.[11]

It should also be noted that Rule 4.2 is limited to *ex parte* communications with "represented persons." Not all jurisdictions which have adopted the Model Rules have adopted the comments. Courts have used a variety of tests to determine the scope of Model Rule 4.2 and some jurisdictions have modified Model Rule 4.2 in efforts to clarify its scope. Most notably, the New Jersey Supreme Court has adopted a version of Model Rule 4.2 which allows *ex parte* contact with employees of a corporate party, as long as those employees are not members of the corporation's "litigation control group." Members included within a party's "litigation control group are current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter, whether or not in litigation..." "Significant involvement" requires involvement greater than the supplying of factual information or data respecting the matter. Excluded from the control group are former employees as well as current employees who, although they may have been involved in the subject matter of the case, do not play a role in the process of resolving it.[12] You should look to the law of each jurisdiction of concern to determine the scope of its limitations on *ex parte* communications.

IV. The Federal Employers Liability Act

Congress enacted FELA,[13] "to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of the employer or their fellow employees."[14] In 1939, Congress amended FELA by adding Section 60, which provides:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall [be subject to criminal sanctions]: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other

[11] *See Juan Mendez, et al v. Hovensa, L.L.C.*, 2008 WL 906768 (D.Virgin Islands) for an in depth discussion of the coexistence of Rule 4.2 and FRE 801. *See also Jimmy Paris v. Union Pacific*, 450 F.Supp.2d 913 (E.D. Ark. 2006).
[12] *See* New Jersey Supreme Court Supplemental Report: Special Court Committee on R.P.C. 4.2 (May 6, 1996).
[13] 45 U.S.C. § 51, et seq.
[14] *Atchinson T&S.F. Ry. v. Buell*, 480 U.S. 557, 561 (1987).

privileged or confidential reports.[15]

Section 60 was added in response to railroad companies' attempts to prevent FELA suits by coercively discouraging their employees from talking with plaintiff lawyers. "The purpose of the amendment...[was to] permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee or his dependents, or someone authorized to represent him or them."[16] Congress's concern was to allow an injured employee equal access to all factual information. Because the factual development of FELA suits rests largely on fellow worker testimony, rules prohibiting or intimidating employees from giving interviews effectively circumvent the Congressional intent in enacting FELA.

Section 60 promotes the Congressional intent by (1) allowing railroad employees to relate factual information to plaintiff lawyers because an lawyer representing an injured railroad worker is "a person in interest,"[17]; (2) by providing for criminal sanctions for any actions "whatsoever" which prevent a person from voluntarily giving information; and (3) by continuing to protect confidential and privileged information.[18]

V. The Conflict and the Answer: Preemption as a Plaintiff's Tool

The interaction of FRCP 11, Rule 4.2 and FELA Section 60 creates a conflict to the extent that Model Rule 4.2 prohibits *ex parte* communications with fellow employees. This conflict has been characterized as follows:

> FRCP 11 imposes a duty upon lawyers to conduct a reasonable inquiry into the factual claims of their clients. The ethical limitations under Model Rule 4.2, however, curb the ability to fulfill the obligations under FRCP 11. …Lawyers, however, do not violate Model Rule 4.2 if they are "authorized by law to do so." If section 60 authorized lawyers representing injured railroad workers with a FELA claim to conduct *ex parte* interviews with railroad employees, then plaintiff lawyers will not be violating ethical rules. If section 60 only prohibits the railroads from suppressing information, then plaintiff lawyers will violate Model Rule 4.2 if they have *ex parte* communications with a represented party. Consequently, if plaintiff lawyers cannot investigate the factual claims of their clients, then a court may sanction them under FRCP 11.[19]

However, preemption could be the cure for this conflict if Section 60 is read to supplant Rule 4.2. Normally, preemption is the nail in the coffin of many plaintiffs' cases. As recently as May 13, 2008, an article from the Associated Press in Washington on preemption detailed how the Baxter Healthcare Corporation is seeking to use the doctrine of preemption to shield it from

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[15] 45 U.S.C. § 60.
[16] S. Rep. No. 661, 76th Cong., lst Sess. 5 (1939).
[17] *Sheetmetal Workers International Assoc. v. Burlington Northern Railroad Co*., 736 F. 2d 1250 (8th Cir. 1984)
[18] Schmieder, Stuck on the Tracks: The FELA Engine vs. The Ethical Caboose, 20 So.Ill.U.L.J. 331 (1996).
[19] Id.

any civil liability.[20] Baxter is claiming that once the FDA approved the labeling and packaging at issue, it became immune from civil suits for money damages.[21]

Many plaintiff lawyers dealing with railroad defendants, especially in crossing cases, are all too familiar with this fly in the ointment. There cannot be any mention of the speed of the train, there cannot be any mention of gates and lights, there cannot be any mention of state law as it has been "substantially subsumed" by the regulations of the Federal Railroad Safety Act.[22]

However, in the situation presented by the conflict between Rule 4.2 and Section 60, plaintiff lawyers can effectively use the preemption argument instead of being killed by it.

Principles of federalism require that Section 60 preempt Rule 4.2 if these two provisions cannot be consistently read and applied together. Federal legislation should override state law when no other construction of the federal enactment is possible. Congress manifested its intention that Section 60 primes. The argument for a plaintiff's lawyer is that Congress can be no clearer in its intention to "prevent any direct or indirect chill on the availability of information to any party in interest in an FELA claim."[23] The single purpose of the FELA is to provide a remedy for injured railroad workers. To this end, FELA must be interpreted liberally to subsume state laws to provide a uniform system of rules for railroad workers' injury claims. With the all inclusive language of Section 60 using words such as "any" and "whatsoever," Congressional intent was to negate any attempt by any "rule, regulation, or device whatsoever…" subduing the availability of information.

A federal case on point is *Wayne L. Pratt v. National Railroad Passenger Corporation.*[24] In *Pratt*, the USDC addressed this preemption issue by turning to the legislative history of Section 60 found almost entirely in a single Senate Committee Report which states in pertinent part:

> The railroads maintain well-organized and highly efficient claim departments. When an employee is injured, the claim agent promptly endeavors to procure statements from all witnesses to the infliction of the injury, takes photographs, measurements, and obtains all available information considered necessary to protect the railroad company against a possible suit for damages. On the other hand, the claimant may be seriously handicapped in his attempt to procure the information necessary to the determination of the question of liability. For example, a substantial number of railroads subject to the Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents. The purpose of the amendment under consideration is to

[20] Yost, *Bush Administration Rules Limit Lawsuits*, Associated Press Washington, May 13, 2008.
[21] Id.
[22] For an in-depth discussion of preemption, *see Federal Preemption and Preclusion: Why The Federal Railroad Safety Act Should Not Preclude The Federal Employer's Liability Act*, 51 Loy.L.Rev. 947 (2006).
[23] *Cavanaugh v. Western Md. Ry*., 729 F.2d 289 (4th Cir. 1984).
[24] *Pratt v. Nat'l R.R. Passenger Corp.*, 54 F. Supp. 2d 78 (D. Mass. 1999).

> prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them.[25]

As the *Pratt* Court notes, the drafters of Section 60 were primarily concerned with the restrictions imposed by the railroads on their employees and trying to equalize the influence of the railroads and employees in the context of litigation. However, "since Model Rule 4.2 [in Massachusetts] is interpreted to be broadly protective of corporations, it creates just those inequities that Congress specifically chose to rectify by enacting Section 60"[26] The Court further states that if Section 60 is not the type of legal authorization for ex parte communication envisioned by Rule 4.2, it is difficult to image what is.[27]

Furthermore, Congress was aware of the ethical restrictions on *ex parte* communications when Section 60 was enacted in 1939 since the ethical rules date back to at least 1908. In a footnote, the *Pratt* Court notes that the broad language of Section 60, along with the legislative history citing railroad promulgated rules only as an example, demonstrates that Congress **was not** solely limiting the ramifications of Section 60 to rules written by railroads.[28] (Emphasis added)

Although plaintiff lawyers can see clearly the preemptive nature of Section 60 with regards to Rule 4.2, defense counsel will try to muddy the water with an argument to harmoniously apply and reconcile Section 60 and Rule 4.2. Defense counsel will argue that Section 60 is limited to actions of a railroad designed "to prevent" a FELA plaintiff from having access to employee-witnesses. The argument will characterize the statute as a prohibition rather than an authorization.[29] Counsel will also dramatize the fact that the Courts are split as to the interpretation of Section 60 superseding Rule 4.2.[30]

However, Section 60's prohibition against restrictions by any source on the access of information is evidenced by its broad language: "any contract, rule, regulation, or device whatsoever" which attempts to prevent the furnishing of information and "whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever shall attempt to prevent any

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[25] S.Rep. No. 661, 76th Cong., 1st Sess. 5 (1939).
[26] *Pratt v. Nat'l R.R. Passenger Corp.*, 54 F. Supp. 2d 78 (D. Mass. 1999).
[27] *Id.* at 82.
[28] *Id.* at 82.
[29] *FELA § 60 v. Ethical Rule 4.2: More Than Meets The Eye in a Conflict Between State's Rights and Federal Law*, 69 UMKCLR 791 (2001).
[30] For cases applying Section 60 as superseding Rule 4.2, see *Jimmy Paris v. Union Pacific R.R. Co.*, 450 F. Supp.2d 913 (E.D. Ark. Sept. 28, 2006); *Pratt v. Nat'l R.R. Passenger Corp.*, 54 F. Supp. 2d 78 (D. Mass. 1999); *Shaffer v. Union Pac. R.R.*, No. 95-631-FR, 1996 WL 76157 (D.Or. Feb. 14, 1996); *Mayfield v. Soo Line R.R.*, 1995 WL 715865, (N.D. Ill.Dec. 4, 1995);*United Transp. Union v. Metro-North Commuter R.R. Co.*, 1995 WL 634906 (S.D.N.Y. Oct. 30, 1995); *Blasena v. Consolidated Rail Corp.*, 898 F. Supp. 282 (D.N.J. 1995); *Lake v. Orgulf Transp. Co.* 1993 WL 194096 (W.D. Tenn. May 24, 1993; *Faragher v. National R.R. Passenger Corp.*, 1992 WL 25729 (E.D.Pa. Feb. 7, 1992); *Harper v. Missouri Pac. R.R. Co.*, 264 Ill.App. 3d 238 (Ill.App.1994); *Norfolk S. Ry. Co. v. Thompson*, 208 Ga.App. 240 (1993).

person from furnishing voluntarily such information..." Such broad language of Section 60 clearly goes beyond the provisions of FELA Section 55 which specifically addresses conduct by the railroad companies. Thus, the prohibition of Section 60 of interference with access to information is not limited to railroad action, but applies to interference with factual development of a FELA claim from any source. Therefore, Section 60 evidences a Congressional intent to preempt interfering state rules.[31] In addition, it is further suggested that Section 60 may also preempt administrative rule making as a pronouncement of Congress certainly primes bureaucratic rule making.

VI. More Arguments in Favor of Ex Parte Communication

Additional plaintiff lawyers' arguments continue with the premise that FELA must be liberally interpreted to accomplish its overriding purpose of providing a nationwide system of compensation to injured railroad workers free from the vagaries of state laws.[32] The language and history of Section 60 support a liberal reading of its "prohibition on the suppression of information concerning railroad worker injuries."[33] Banning *ex parte* communications with fact witness co-workers would: (1) interfere with the plain intent of the federal scheme, and (2) would deny the plaintiff a right to a fair trial. A ban on informal interviews would hinder the discovery of relevant information and would increase the cost of FELA litigation by forcing a plaintiff to develop facts by formal discovery only thereby encouraging protracted litigation. Effective representation requires that informal discovery take place,[34] and "counsel for all parties have a right to interview an adverse party's witness (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made."[35] Thus, denying a FELA plaintiff informal interviews with co-workers effectively denies the plaintiff his right to effective representation and a fair trial.

Furthermore, a prohibition on *ex parte* communications with fact witnesses would increase the cost and the difficulty in bringing a FELA claim and would effectively reduce the number of FELA claims which would be brought. Also, the presence of opposing counsel at an interview or requiring opposing counsel's consent to *ex parte* interviews would reduce the openness of witnesses. Increases in costs and difficulty of fact development caused by a ban of informal interviews will deter FELA litigation. The consequent deterrence on bringing FELA suits directly contravenes the purposes of both FELA and Section 60: (1) to provide a uniform, nationwide procedure for railroad workers to be compensated for work related injuries, and (2) to allow the plaintiff equal access to relevant, non-privileged information.[36]

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[31] *Harper v. Missouri Pacific R.R.*, 636 N.E. 2d 1192 (Ill. App. Ct. 5th Dist. 1994) (holding that Section 60 preempts any statute or rule, including lawyer ethical rules, that prohibit lawyers from conducting ex parte interviews with railroad employees regarding the facts of any injury under FELA).

[32] *South Buffalo Ry. v. Ahern*, 344 U.S. 367 (1953).

[33] Schmeider, *supra* note 15, at 343.

[34] *Morrison v. Brandeis University*, 125 FRD 14 (D. Mass. 1989)

[35] *IBM v. Edelstin*, 526 F.2d 37, 42(2d Cir. 1975).

[36] *Atchinson, T.&S.F. R.R. v. Buell*, 480 U.S. 557; S. Rep. No. 661, 76th Cong., lst Sess. 5 (1939).

Section 60 protects a FELA plaintiff's right to informally investigate and therefore allows compliance with the mandate of FRCP 11 requiring that lawyers make reasonable inquiries into the factual basis of a client's claims or face possible sanctions. The "creators of [Model] Rule 4.2 obviously did not intend to retard investigations and countermand [FRCP] 11."[37]

VII. Conclusion

A simple weighing of the arguments in favor of the plaintiff as opposed to the ones enunciated for the defense clearly demonstrates that justice requires equal accessibility to all witnesses by both sides excluding the plaintiff himself and the company's designated managerial officers who make decisions with the railroads lawyers.

In closing, there is no authority in law that a rule can ever preempt a law passed by the United States Congress.

[37] *Faragher v. National RR P. Corp., No.* Civ. A. 91-2380, 1992 WL 25729 (E.D. Pa. 1992).