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DRAFT file

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA)	
by RAMSEY CLARK,)	
Attorney General,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION
)	NO. C 67-575
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL NO. 38;)	
ELECTRICAL JOINT APPRENTICESHIP)	
AND TRAINING COMMITTEE,)	
)	
Defendants.)	
)	

MEMORANDUM OF THE UNITED STATES
IN OPPOSITION TO DEFENDANTS'
MOTION TO PROHIBIT INTERVIEWS
OF MEMBERS OF LOCAL 38

In a letter dated October 12, 1967, counsel for the defendants requested that the Department of Justice not interview without his consent and without his presence any ~~members~~^{persons} of the following ~~groups~~:

- " (1) Local 38 members or apprentices,
- " (2) Local 38 present or former employees,
- " (3) Present or former Apprenticeship Committee members or ad hoc interviewers of apprenticeship applicants or present or former employees,
- " (4) Contractors and members of NECA, Cleveland Chapter, who are under collective bargaining agreements with defendant Local 38."

The United States responded to that request by a letter dated October 17, 1967. In ^{that letter} ~~it~~ we agreed ~~not to~~ ^{the} ~~notify defense counsel prior to interviewing~~ of current officers or managing agents of Local 38 and the Joint Apprenticeship Committee; ^{without first advising him,} ~~we would be required~~ ^{to} ~~agents of the defendants.~~ But we ~~declined to promise~~ ^{did not accede to his request} that we would ~~notify him prior to interviewing the~~ ^{that for purposes of} other persons listed ^{we notify him and conduct the interview in his office} for the purpose of having defense counsel present ^{at times when [he was] able to be present."} at the interviews. (Copies of both the October 12, 1967, and October 17, 1967, letters ~~were~~ ^{have been} supplied to the Court.)

Defendants have now moved the Court to ^{enter an} order ^{prohibiting his from} ~~that we not~~ interview persons ^{who are} ~~whose~~ members of defendant Local 38 and ^{regarding that, with respect to such persons,} ~~your~~ pre-trial preparation ~~regard~~ ^{ing these persons} be confined to taking their deposition.

^{me H} In their motion, defendants do not contest our right to interview, without notice to defense, ^{counsel and without his being present} ~~present~~ of ^{a present} ~~former~~ employees of ^{Local 38} ~~defendants~~, ~~or~~ contractors and members of NECA under collective bargaining agreements with ~~defendant~~ Local 38, ~~or~~ ^{former or present} ~~ad hoc~~ interviewers of apprenticeship applicants or ^{present or former} ~~present~~ employees of the Apprenticeship Committee. ^{all included in the original letter of October 12, 1967.} Nor ~~would~~ ^{claim} there be any basis ~~whatsoever~~ for such a ~~claim~~. Thus the only class of potential interviewees about which the parties have not been able to agree is ^{persons who are} ~~members of~~ Local 38. ^{with respect to these persons defendants claim} This ~~opposition~~ is based on two grounds: first, ~~that~~ ^{some} of these ^{persons} are "prospective witnesses of

^{defendants} ~~The~~ letter of October 12, 1967 referred to "Local 38 members or apprentices"

Apprenticeship Local 38 who are not presently yet members of the union.

defendants; and second, that ~~some of these members may~~ ^{these persons are} "possible agents" of defendant Local 38. ~~be considered agents of the~~ defendant union. Both

grounds are without merit.

^{"prospective witnesses"}

Defendants do not cite, nor ~~is~~ ^{are we} plaintiff aware

of any authority or reason for a general prohibition

^{against} ~~on~~ confidential interviews ^{by the plaintiff} of persons ^{simply because they} who might be called ^{as witnesses for defendants, that is, they are} persons referred to by defendants ^{as new} as "prospective

witnesses." ^{2/ In fact} ~~On the contrary,~~ Canon 39 of the American

Bar Association Canons of Professional Ethics ^{dealing with such interviews by attorneys,} specifi-

cally states ~~in part~~ ^{in whole} to the contrary:

A lawyer may properly interview any witness or prospective witness for the opposing side in any civil suit or criminal action without the consent of opposing counsel or party. ^(Emphasis added) In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial or on the witness stand.

^{Footnote} 2/ With respect to this branch of their argument, defendants ^{sole} claim that if such interviews are conducted of prospective witnesses "before defendants decide to use them and interview them, an impossible burden" will be placed "on the defense." But surely this "burden" ~~defend~~ defendants

~~are~~ ^{is} apparently referring to, namely, of interviewing all persons ^{is imposed by defendants' trial preparation and} in view, could only be reduced if ~~the~~ ^{the} ~~United States~~ ^{the} were prohibited from interviewing any ~~other~~ ^{person other} than ~~those~~ ^{those} called by the ~~defendants~~ ^{call} as witnesses. This would mean that the United States could not conduct a major portion of its trial preparation until it depose completed its trial preparation and would place unprecedented and unthinkable limitations upon the ability of the United States to fully investigate the facts and prepare for trial.

It is difficult to understand what "burden" defendants are referring to

The purpose of this Canon is clearly to identify non-party witnesses as available for interviewing by either side, regardless of a witness' association with a party. The Canon specifically dismisses as an objection to interviewing the fact that a witness may be an actual or prospective witness for the opposing side.

Confidential interviews are a traditional and essential means of investigation, ^{by a party and its agents of "prop"} and no limitations should be placed on such interviews ^{simply because the persons are prospective witnesses.} Such interviews ~~conducted~~ with the candor required by

~~and~~ frequently produce information and evidence not possible in the context of a formal deposition, ^{and it minimizes the use of}

^{formal depositions as part of the pre-trial preparation.}

UNION MEMBERS INDIVIDUALLY ARE NOT PARTIES AND MAY BE INTERVIEWED BY PLAINTIFF WITHOUT NOTICE TO DEFENSE

2. "Possible Cause."

Defendants oppose the interview of union members by plaintiff on

the additional ground that all or some of such members may be "agents" of the union, and consequently ~~bind the union through admission.~~

Defendants cite no statute, rule of court, or case holding "agents"

immune from contact by opposing parties. Presumably defendants

urge this Court to invoke professional prohibitions as defined in Canon

9 of the American Bar Association Canon^s of Professional Ethics, which states:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. ~~It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.~~

Canon 9 defines an exception to the general rule of Canon 39 that any witness is available for contact by either party. The question

hererepresented is whether rank and file members of Local 38 are "parties,"

XXXX
XXXX

represented by counsel for defendants, and therefore not within the general availability prescribed by Canon 39.

The breadth of construction appropriate to Canon 9 should be ^{limited to} ~~prescribed by~~ its purposes. First, ~~strict avoidance of contact with a~~ party represented by counsel precludes a tactic of divide-and-conquer. The Canon protects the litigative ~~process~~ ^{process} by controlling the points of access between the adversaries so that each side speaks with a unified voice. Second, the Canon guarantees the adversary's client the full protection of professional representation. The foolish or headstrong client will not--even voluntarily--be permitted to make compromising or embarrassing statements to an attorney trained and engaged to oppose him.

Neither of these purposes of the Canon would be served by including each rank and file member of Local 38 as a "party represented by counsel."

In no sense are rank and file members "clients" of the union counsel. As individuals they have no control over his selection or retention; they have no control over the conduct of the lawsuit. In the only case located by plaintiff which specifically considers the relationship between a union attorney and rank and file members, the court held that the members were not clients of the attorney so as to preclude him from representing officers of the union in an action by some members against ^{and on} ~~their~~ employer, ~~and the officers.~~ In Almon ~~Corp.~~ v. American Carloading Corp., 312 Ill. App. 225, 38 N.E.2d 362 (1941), reversed on other grounds, 380 Ill. 524, 44 N.E.2d 592 (1942), the court stated:

. . . [The union attorney] has never sustained the relationship of attorney for these individual plaintiffs [members of the union]. They have not placed confidence in him in that relationship. On the contrary, plaintiffs have voluntarily assented to create new legal entities which, from the standpoint of the law, are distinct from these plaintiffs

themselves as any person other than themselves could be. The relationship of attorney and client does not now and never has existed between [the union attorney] and any one of these plaintiffs. The fact that indirectly by contribution plaintiffs have assisted in providing the funds by which the union and the Joint Council retain [the union attorney] does not create the relationship of attorney and client nor the obligations arising out of that relationship in so far as these plaintiffs are concerned.

Insert
It is particularly significant that in Title VII cases such as the present one some of the union members may themselves have been subjects of the discriminatory conduct alleged in the complaint. Discrimination by a union against some of its members is specifically prohibited by the Act. 42 U.S.C.A. § 2000e-2(c)(2). In these instances the Attorney General ⁱⁿ represents ^{the United States, with respect to labor union matters} the interests of members as well as non-members, ^{agency} and the general public.

The statute specifically contemplates cooperation by members in discrimination suits against their unions. Section 2000e-3(a) provides:

Insert
It shall be an unlawful employment practice . . . for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter (Emphasis ~~added~~.)

Indeed, it may be essential to ~~to~~ obtain the cooperation of some members ^{read and file} to effectively enforce the Act.

Moreover, the divide-and-conquer tactic precluded by Canon 9 is not relevant to union members because individually they cannot speak for the union in this lawsuit. For purposes of Canon 9 union members are like employees of a corporate litigant. In formal Opinion 117

↑ insert B
In formal opinion 117

[ABA Opinions on Professional Ethics, page 371 (1967 Ed.)], the ABA Committee on Professional Ethics concluded that a plaintiff may properly interview employees of a corporate defendant who were witnesses to the incident upon which the suit was based. A similar conclusion has been reached by the Committee on Professional Ethics of the Association of the Bar of the City of New York. See Opinions No. 331 (February 28, 1935) and No. 613 (April 15, 1942). Clearly, if corporate employees may properly be interviewed, the class of persons involved with a corporation or association who may be considered parties is not co-extensive with persons who may be "agents" of the party in some instances, ~~nor those who may have inside information concerning the events subject to dispute.~~

§ The appropriate limitation in corporation or association cases ~~would be~~ ^{is} to those individuals who have authority to control the lawsuit in the sense of having authority to initiate or settle it. Canon 9 by its terms relates to this type of authority. See Drinker, Legal Ethics (1953) at page ^{and 201} 85. For purposes of the present litigation, this class would include only current officers or managing agents of defendants, whom plaintiff has agreed in its letter of October 17 not to interview without consent of counsel for defendants. As stated in that letter, this position was adopted by the court in a similar case in the Southern District of Ohio, United States v. International Brotherhood of Electrical Workers, Local No. 212 (Cincinnati), C.A. No. 6473 (S.D. Ohio), (Hogan, J.).

For these reasons plaintiff respectfully requests the Court to deny the defendants' motion to restrict interviewing of union members.

Respectfully submitted,

OWEN ~~KISS~~ M. FISS
Attorney ~~for Plaintiff~~

C.R.D.

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