

Not Reported in F.Supp.2d, 2008 WL 2168893 (W.D.Ky.)
(Cite as: **2008 WL 2168893 (W.D.Ky.)**)

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United States District Court, W.D. Kentucky,
Paducah Division.
Allyn HORNICK, Plaintiff
v.
AMERICAN COMMERCIAL BARGE LINE, De-
fendant.

No. 5:07CV-140R.
May 23, 2008.

[Dennis M. O'Bryan](#), [Gary W. Baun](#), O'Bryan Baun-
Cohen Kuebler, Birmingham, MI, for Plaintiff.

[David R. Monohan](#), Scott A. Dyer, Woodward, Hob-
son & Fulton, LLP, Louisville, KY, for Defendant.

MEMORANDUM OPINION

THOMAS B. RUSSELL, District Judge.

*1 This matter comes before the Court on De-
fendant's Motion for Protective Order precluding
Plaintiff's attorney from ex parte contact with De-
fendant's employees whose statements could consti-
tute an admission of Defendant under the Federal
Rules of Evidence (Docket # 17). Plaintiff has filed a
response (Docket # 20) to which Defendant has re-
plied (Docket # 21). This matter is now ripe for adju-
dication. For the reasons that follow, Defendant's
Motion for Protective Order is GRANTED IN PART
and DENIED IN PART.

BACKGROUND

This action is maritime personal injury in nature
and arises from an incident of personal injury which
occurred on March 27, 2007, while Plaintiff was
onboard Defendant's vessel, the M/V Tom Frazier.
Plaintiff served as the Chief Engineer of the vessel.

Plaintiff claims that he was assaulted by the vessel's
Captain, William Richardson. Plaintiff believes that
all or part of the incident was witnessed by
non-supervisory vessel personnel and that
non-supervisory vessel personnel had witnessed prior
incidents of assault and/or battery perpetrated by
Richardson upon other non-supervisory vessel per-
sonnel. Plaintiff's counsel has announced his intention
to conduct ex parte interviews of crew members and
requested full contact information for all crew mem-
bers, with the exception of the captain and pilot, from
Defendant.

DISCUSSION

Defendant argues that under the current version of
[Fed.R.Evid. 801\(d\)\(2\)\(D\)](#) courts now recognize that
the ethical rules of practice preclude *ex parte* contact
with non-managerial employees whose statements
could be offered as an admission of the represented
employer. Defendant seeks a protective order prohib-
iting Plaintiff's counsel from *ex parte* contact with
crew member employees of the M/V Tom Frazier or,
in the alternative, an order stating that any out-of-court
statement obtained by Plaintiff's counsel through *ex
parte* contact with crew member employees of the
M/V Tom Frazier shall be inadmissible into evidence
as a statement or admission of Defendant.

**I. INTERACTION BETWEEN THE ETHICAL
RULES AND FELA**

Under Rule 83.3 of the Joint Local Rules for Civil
Practice for the United States District Courts of the
Eastern and Western District of Kentucky, federal
courts in Kentucky apply the rules adopted by the
Kentucky Supreme Court governing professional
conduct. [Kentucky Supreme Court Rule 3.120\(4.2\)](#)
states that "[i]n representing a client, a lawyer shall
not communicate about the subject of the representa-
tion with a party the lawyer knows to be represented
by another lawyer in the matter, unless the lawyer has

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the consent of the other lawyer or is authorized by law to do so.”

Plaintiff argues that Section 60 of the Federal Employer's Liability Act (“FELA”), [45 U.S.C. §§ 51 et seq.](#), allows Plaintiff to contact Defendant's employees without the presence of Defendant's counsel. The Sixth Circuit has held that, pursuant to [46 U.S.C. § 30103](#), FELA rules and decisions also govern Jones Act litigation.^{FN1} [Yehia v. Rouge Steel Corp.](#), 898 F.2d 1178, 1184 (6th Cir.1990). Section 60 of FELA states, in pertinent part:

FN1. [46 U.S.C. § 30103](#) provides, in pertinent part:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

*2 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, upon conviction thereof, be punished by a fine of not more than \$1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for

each offense: 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 privileged or confidential reports.

[45 U.S.C. § 60](#). Plaintiff's counsel is a “person in interest” within the meaning of [Section 60](#). [Sheet Metal Workers Int'l Ass'n v. Burlington N. R.R. Co.](#), 736 F.2d 1250, 1251-52 (8th Cir.1984).

There is a sharp division among district courts on the question of whether [Section 60](#) of FELA overrides ethical rules prohibiting a plaintiff's lawyer from contacting employees of a defendant in a railroad or Jones Act action without the awareness of defense counsel.^{FN2} It appears that the Seventh Circuit in [Weibrecht v. Southern Illinois Transfer, Inc.](#), 241 F.3d 875 (7th Cir.2001), is the only Court of Appeals to have ruled on this issue.

FN2. For cases interpreting [Section 60](#) of FELA as superseding or preempting the ethical rule see [Pratt v. Nat'l R.R. Passenger Corp.](#), 54 F.Supp.2d 78 (D.Mass.1999); [Blasena v. Consol. Rail Corp.](#), 898 F.Supp. 282 (D.N.J.1995); [United Transp. Union Local Unions 385 & 77 v. Metro-North Commuter R.R. Co.](#), No. 94 Civ. 2979, 1995 U.S. Dist. LEXIS 15989, 1995 WL 634906 (S.D.N.Y. Oct. 27, 1995).

For cases applying the ethical rule over [Section 60](#) of FELA see [Weibrecht v. S. Ill. Transfer, Inc.](#), 241 F.3d 875 (7th Cir.2001); [Groppo v. Zappa, Inc.](#), No. 03-CV-10384-MEL, 2005 U.S. Dist. LEXIS 5651, 2005 WL 768652 (D.Mass. Mar. 30, 2005); [In re PMD Enters. Inc.](#), 215 F.Supp.2d 519 (D.N.J.2002); [Lewis v. CSX Transp., Inc.](#), 202 F.R.D. 464 (W.D.Va.2001); [Woodard v. Nabors Off-shore Corp.](#), No. 002461, 2001 U.S. Dist. LEXIS 177, 2001 WL 13339 (E.D.La. Jan.

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[4, 2001](#)); [Belote v. Maritrans Operating Partners, L.P., No. 97-3993, 1998 U.S. Dist. LEXIS 3571, 1998 WL 136523 \(E.D.Pa. Mar. 20, 1998\)](#); [Tucker v. Norflok & W. Ry. Co., 849 F.Supp. 1096 \(E.D.Va.1994\)](#).

In *Weibrecht*, the representative of a deckhand who drowned while helping secure a barge to a tug sued the decedent's employer, the owner of the vessel, under the Jones Act. *Id.* at 877. Two days before the scheduled deposition of the tug's pilot, the plaintiff, at the suggestion of his attorney, called the pilot and discussed the plaintiff's theory of the case. *Id.* The plaintiff also suggested that the pilot contact the plaintiff's attorney. *Id.* The next day, the plaintiff's attorney called the pilot and left a message asking him to call back. *Id.* at 878. The defendant moved for sanctions claiming that the two calls violated [Illinois Rule of Professional Conduct 4.2](#).^{FN3} *Id.* The plaintiff's counsel contended that the contacts were permissible under [Section 60](#) of FELA because [Section 60](#) superseded [rule 4.2](#). *Id.* at 879. The plaintiff's counsel argued that because [rule 4.2](#) might prevent maritime employees from voluntarily providing relevant information about an accident giving rise to a Jones Act action, it is exactly the kind of "rule, regulation, or device" that [Section 60](#) declares void. *Id.* However, the Seventh Circuit found no "irreconcilable conflict" between [Section 60](#) and [rule 4.2](#), and held that [Section 60](#) did not supersede [rule 4.2](#). *Id.* at 880.

[FN3](#). The Southern District of Illinois has adopted Illinois' ethical rules as its own rules of professional conduct. [Weibrecht, 241 F.3d at 878](#). [Illinois Rule of Professional Conduct 4.2](#), which is substantially similar to [Kentucky Supreme Court Rule 3.120\(4.2\)](#), reads as follows:

During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of

the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

*3 The Seventh Circuit found that [Section 60](#) prohibits rules that prevent railroad or maritime employees from furnishing information about a worker's injury or death, but that "nothing in [[Section](#)] [60](#) necessarily requires that the plaintiff's lawyer be allowed to gather information outside the presence of an employee's attorney." *Id.* The court concluded that if an employee was represented, [rule 4.2](#) requires the plaintiff's attorney "to go through the employee's lawyer (who is most likely the company's lawyer) to schedule a deposition or otherwise gain information from the employee." *Id.* The court found that such a requirement did not amount to "a rule or device that prevents the employee from furnishing information to the plaintiff's attorney." *Id.*

Moreover, the Seventh Circuit stated that if it read the word "prevent" in [Section 60](#) to include the "marginal deterrence" imposed by [rule 4.2](#), then it "would effectively be finding that FELA and the Jones Act were intended to displace generally applicable ethical rules." *Id.* The court found no evidence of such an intent in either the text or the legislative history of either statute. *Id.* The court noted that when [Section 60](#) was enacted in 1939, "the attorney ethical rule against contacting represented parties was an ingrained part of the legal system," and "[h]ad Congress wanted [[Section](#)] [60](#) to override such a long-standing rule of legal ethics, it easily could have said explicitly that it was doing so." *Id.*

The Seventh Circuit also rejected the alternative argument that [Section 60](#) satisfies [rule 4.2](#)'s exception for contacts with represented parties when "otherwise ... authorized by law," finding that [Section 60](#), by its terms, does not authorize anything. *Id.* "Rather

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[Section] 60 is a prohibition on certain conduct by railroads and maritime employers: these employers are forbidden from enacting rules or regulations that prevent employees from disclosing information to FELA or Jones Act plaintiffs.” *Id.* at 880-81. The court observed that Section 60’s reference to a “rule, regulation, or device” “appears to refer only to internal rules or regulations promulgated by employers.” *Id.* at 881. The court found that even if Section 60 were read more broadly, there is “nothing to suggest that it was designed to authorize conduct that would otherwise violate general ethical rules.”

This Court finds the analysis of the Seventh Circuit in *Weibrecht* to be compelling. Plaintiff asserts that *Weibrecht* has been superceded and is no longer of any force or effect to the language of 46 U.S.C. § 30104 as the Jones Act was revised in 2006, after *Weibrecht* was decided, and still includes the provision that “the laws of the United States regulating recovery for personal injury to, or death of, a railroad employee apply to an action under this section.” However, this Court finds that the continued inclusion of this provision does not indicate a Congressional intent that FELA and the Jones act were intended to displace generally applicable ethical rules. If Congress had intended to displace these ethical rules it could have explicitly said that it was doing so. *See id.* at 880.

*4 Without an expression of Congressional intent to the contrary, it would be unsound to hold that a provision of a federal statute preempts a well-established state rule, especially in light of the fact that the regulation of the ethical conduct of lawyers is inherently within the purview of state courts, and that the provisions of [the ethical rule] are generally applicable in most, if not all, states.

Grosso v. Zappa, Inc., No. 03-CV-10384-MEL, 2005 U.S. Dist. LEXIS 5651, 2005 WL 768652 (D.Mass. Mar. 30, 2005).

Accordingly this Court concludes that Section 60 of FELA does not take precedence over SCR 3.120(4.2) nor does Section 60 satisfy the rule’s exception for contacts with represented parties when “otherwise ... authorized by law.” This Court must therefore determine whether the crew members, with the exception of the captain and pilot, are represented parties under SCR 3.120(4.2).

II. DEFINITION OF REPRESENTED PARTY

SCR 3.120(4.2) prohibits a lawyer when representing a client in a matter from communicating with a party the lawyer knows to be represented in that matter about the subject of the representation unless that lawyer has the consent of the other party’s lawyer or is authorized by law to do so. The commentary to the rule states:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Pursuant to Fed.R.Evid. 801(d)(2)(D), a statement offered against an employer made by an employee concerning a matter within the scope of his employment, which was made during the employment relationship, constitutes an admission of the employer.

In Formal Ethics Opinion KBA E-382, the Kentucky Bar Association addressed SCR 3.120(4.2). They wrote:

To illustrate, assume that the Acme Storage Company has four employees: Al the president, Bob a loader, Carl a loader and Diana a secretary. One day there is an accident on the loading dock in which

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Pete, who was delivering goods, was injured by the alleged negligence of Bob. Carl was working on the dock and observed the accident. Diana was taking a break on the loading dock to have a smoke and also observed the accident. Pete's lawyer notifies Acme of his intent to sue Acme for the negligence of Bob and Acme's lawyer notifies Pete's lawyer that none of the Acme employees are to be interviewed without consent. Pete's lawyer:

- 1) may not interview Al without consent because Al has managerial responsibility;
- 2) may not interview Bob without consent because his act (driving the truck) may be imputed to Acme;
- 3) may not interview Carl without consent because it is contemplated that he will be asked about matters within the scope of his employment (the operation of the loading dock) and any statement he makes in that regard will be an evidentiary admission of Acme under [KRE 801A\(d\)\(2\)\(D\)](#) ^{FN4};

^{FN4}. There is no [KRE 801A\(d\)\(2\)\(D\)](#) nor did one exist at the time that Formal Ethics Opinion KBA E-382 was written. However, it is clear from the context of the ethics opinion that the Kentucky Bar Association was actually referring to [KRE 801A\(b\)\(4\)](#) which closely mirrors [Fed.R.Evid. 801\(d\)\(2\)\(D\)](#). [KRE 801A\(b\)\(4\)](#) states that a statement shall be considered an admission of a party if it is offered against that party and is “[a] statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.”

*5 4) may interview Diana without consent because it is not contemplated that Diana will be asked any questions about matters within the scope of her employment.

KBA, Ethics Op. KBA E-382 (1995).

The employees which Plaintiff's counsel wishes to interview are similar to Diana in the above example. Plaintiff's counsel seeks to conduct ex parte interviews of crew members concerning Richardson's alleged assault of Plaintiff and other prior incidents of assault and/or battery perpetrated by Richardson upon other non-supervisory vessel personnel. This Court cannot find how Richardson's assault or battery of any member of the crew would come within the scope of these crew member's employment. However, if Plaintiff's counsel ex parte contact with these crew members results in a statement that would constitute an admission of Defendant under [Fed.R.Evid. 801\(d\)\(2\)\(D\)](#), this Court finds that such statement shall be inadmissible into evidence as a statement or admission of Defendant.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Protective Order is GRANTED IN PART and DENIED IN PART.

Plaintiff's counsel may conduct ex parte interviews of these crew members and Defendant shall provide Plaintiff with the requested contact information. However, any statement resulting from Plaintiff's counsel's ex parte contact with these crew members that would constitute an admission of Defendant under [Fed.R.Evid. 801\(d\)\(2\)\(D\)](#) shall be inadmissible into evidence as a statement or admission of Defendant.

An appropriate order shall issue.

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END OF DOCUMENT

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