

Permission First. Not Forgiveness Later.  
The Dos and Don'ts of Ex Parte Communications and Vessel Inspections

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Recently, ex parte statements and attorney misconduct arose in the U.S. District Court for Massachusetts concerning cases under the Federal Employers Liability Act (“FELA”) and the Jones Act. The circumstances of the matter described below provide examples of how attorneys should adhere to local ethics rules adopting ABA Model Rule of Professional Conduct 4.2 (the “No Contact Rule”) in order to avoid sanctions and potential discipline. Specifically, FELA and Jones Act personal injury counsel have relied on old and disparate FELA and Jones Act case law to claim they can take secret ex parte crew interviews and statements in good faith compliance with the law. The District Court of Massachusetts’ decision of *In re G&J Fisheries, Inc.*, holds that this is no longer the case.

In November of 2017, Claimant Peter Amaral worked as a deckhand aboard the commercial fishing vessel F/V GEORGES BANKS where he claims to have suffered injuries while lifting a basket of scallops.<sup>3</sup> F/V GEORGES BANKS (the “Vessel”) is a scalloper owned by G&J Fisheries, Inc. (“G&J Fisheries”). On November 30, 2018, counsel for G&J Fisheries notified Claimant Amaral’s counsel that he represented G&J Fisheries.<sup>4</sup>

The Vessel was operated by a Captain, Mate, and several crew under the rotating supervision of the Captain and Mate, as is typical in the scallop industry.<sup>5</sup> Shortly following the notice of representation, a full-time investigator on staff for Claimant’s counsel attempted and

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<sup>3</sup> *In re Matter of G&J Fisheries, Inc. as owner of F/V GEORGES BANKS*, No. 20-11703-LTS, \*1 (D. Mass. August 17, 2022).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

completed a series of ex parte interviews of the Mate and crew between December 3, 2018 and January 23, 2019.<sup>6</sup>

The investigator conducted more ex parte interviews between November 2019 to March 2020 concerning what Claimant's counsel purported to be a different matter. In February 2020, counsel for G&J Fisheries issued a notice to Claimants counsel to cease and desist the ex parte contacts. Thereafter, G&J Fisheries filed a Motion for a Protective Order and a subsequent Motion for Sanctions, both of which were granted in part.<sup>7</sup>

The Motion for a Protective Order raised a possible violation of Massachusetts Rule of Professional Conduct 4.2, which models the American Bar Association's Model Rules of Professional conduct. Massachusetts Rule 4.2 provides in relevant part that "[i]n representing a client, a lawyer shall not communicate 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 to do so by law or a court order."<sup>8</sup>

In deciding on the Motion for a Protective Order, the court disagreed with Claimant's assertion that District of Massachusetts precedent in *Pratt v. Nat'l R.R. Passenger Corp.* applied noting that the court addressed and overruled this precedent in *Grosso v. Zappa Inc.* where the court found that "[w]ithout an expression of Congressional intent to the contrary, it would be unsound to hold that provision of a federal statute [the Jones Act] 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." The court also considered that the only federal appellate court

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<sup>6</sup> *Id.* at \*2-\*3.

<sup>7</sup> *Id.* at \*7.

<sup>8</sup> *Id.* at \*8.

that has opined on this issue (the Seventh Circuit) held the same as *Grosso* referencing *Weibrecht v. S. Illinois Transfer, Inc.*<sup>9</sup>

The District of Massachusetts' August 2022 order dismissed claimants' argument that FELA § 60 (as applied in the Jones Act) preempts or displaces Rule 4.2 and ordered: 1) that the claimant was precluded from using ex parte statements made by crew members of the vessel to prevent the claimant from reaping a benefit from statements by crew members it would not have otherwise obtained; 2) the claimant must seek permission from the Court prior to the use of any ex parte statements taken from the crew members in a similar matter given the similarity of the cases and totality of the circumstances; 3) the claimant's attorney must pay the reasonable fees and costs associated with the motion practice and related discovery on the issue of the ex parte statements; and 4) the Court relying on settled law noting that a future violation of Rule 4.2 would be viewed as knowing and intentional.<sup>10</sup>

This decision by the District of Massachusetts came with a discussion of the three categories of current employees and agents under Rule 4.2, those "(1) who exercise managerial responsibility in the matter, (2) who are alleged to have committed the wrongful acts at issue in the litigation, or (3) who have authority to act on behalf of the organization to make decisions about the course of the litigation."<sup>11</sup> Here, the court carefully considered that the roles of the Captain and the Mate in taking responsibility for the vessel place these individuals in managerial roles, which is noted to conform with industry general practices.<sup>12</sup> The court concluded there was

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<sup>9</sup> 241 F.3d 875,880 (7<sup>th</sup> Cir. 2001).

<sup>10</sup> *Id.* at \*13.

<sup>11</sup> *Id.* at \*8.

<sup>12</sup> *Id.* at \*9.

insufficient evidence on record to hold that the remaining crewmembers fell within any of the above categories. .

Courts have broad discretion in enforcing the local rules, which typically mirror the ABA Model Rules of Professional Conduct. The sanctions issued by the District Court of Massachusetts explain the breadth of options available to the courts in considering motions for sanctions for attorney misconduct. While the District Court of Massachusetts reasonably considered the prejudice to the Claimant's case in the matter described above, not all circumstances will allow for the same result.

Lessoned learned from the *G&J Fisheries* decision is that it is not acceptable to rely on old district court decisions to conduct secret interviews, and thereafter claim good faith reliance on those decisions in FELA and Jones Act cases when those interviews prove to be unlawful. Most modern decisions, including the only federal appellate decision on point, hold that FELA § 60 does not displace the "No Contact" Rule 4.2. The U.S. District Court of Massachusetts held little patience for this "forgiveness later" approach, and plaintiff's counsel takes such an approach at her peril given modern developments in this area. Should counsel seek interviews of a known represented party, then the proper course is a transparent one: permission first through counsel, motion practice or ordinary discovery channels.



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Attorney Olaf Aprans' practice involves a full range of maritime, environmental, insurance and commercial matters. He represents numerous underwriters, insurers and protection and indemnity ("P&I") clubs, as well as many vessel owners, fishing companies, marinas, tug and barge companies, passenger vessel operators, banks, private lenders and investors. Additionally, Attorney Aprans assists both individuals and businesses in a wide array of general civil matters.

Attorney Aprans has considerable experience in casualty investigations, oil spills and crisis response and litigation resulting from marine casualties. He has significant trial, appellate and arbitration experience relating to admiralty and maritime cases, environmental pollution matters, commercial disputes, personal injury, cargo and property damage, and insurance coverage litigation.

Attorney Aprans also has extensive experience advising clients in business, finance, fisheries and commercial maritime transactions. This includes general business formation and corporate concerns, workouts, loan participations, charter parties, vessel and fishing permit transactions, foreclosure/arrest, preferred mortgages, maritime liens, fishing rights, shipbuilding contracts, and Coast Guard, NOAA/NMFS, and Maritime Administration regulatory issues, including Jones Act citizenship issues.

Before joining Farrell Smith O'Connell, Attorney Aprans worked for nine years at a prominent maritime defense firm in Boston, Massachusetts and for two years at Holmes, Weddle & Barcott, PC in Seattle, Washington. He brings the unique perspective of practicing admiralty and maritime law on both the East and West Coasts and representing interests in both the New England and Alaska fishing industries.

Before becoming a lawyer, Attorney Aprans worked for most of his life as a deckhand onboard F/V BLACK PEARL harvesting lobster out of Gloucester, Massachusetts with his father and brothers. He attended the University of Massachusetts at Amherst tuition free and graduated with a Bachelor of Arts cum laude in Philosophy; attended New England School of Law on a full tuition merit scholarship and graduated magna cum laude in the top 10% of his class. While in law school, he served as an Editor on the New England Law Review, was a student prosecutor for the Essex County District Attorney, and interned for the Hon. David A. Lowy, who presently sits on the Massachusetts Supreme Judicial Court.

Attorney Aprans lives in Gloucester, Massachusetts with his wife and children and often assists local community causes. In the past he has served on the board of directors of The Gloucester Adventure, Inc., which is entrusted with restoring and maintaining the schooner Adventure. He has also provided assistance to Sail GHS (Gloucester High School Sailing Team), and the Gloucester Harbor Community Development Corporation.

### **Practice Areas**

- Admiralty and Maritime Law
- General Litigation, Trial and Appellate Practice
- Insurance Coverage and Defense
- Offshore Wind
- Oil Spills and Pollution
- Personal Injury, Jones Act, and Longshore defense
- Cargo and Property Damage
- Collisions, groundings, and other marine casualties
- Salvage
- Commercial Maritime Transactions
- Coast Guard and Maritime Administration regulatory issues
- NOAA/NMFS regulatory issues and defense of enforcement actions
- Vessel Arrests and Foreclosure
- Fisheries
- Commercial Lending
- Arbitration and Alternative Dispute Resolution
- General business law and corporate concerns

### **Admissions**

- Commonwealth of Massachusetts
- U.S. District Court, District of Massachusetts
- U.S. Court of Appeals, First Circuit
- U.S. Supreme Court

### **Education**

- New England School of Law, J.D., magna cum laude, 2007
- University of Massachusetts, B.A., Philosophy, cum laude, 2004
- Gloucester High School, 2000

### **Professional Associations**

- Maritime Law Association of the United States
- Massachusetts Lobsterman's Association

- Propeller Club of the United States, Port of Boston

## Notable Cases

- Order sanctioning Jones Act plaintiffs' counsel for conducting improper ex parte crew interviews. *In re G&J Fisheries, Inc.*, C.A. No. 20-11703-LTS (D. Mass., Doc. No. 104, Aug. 17, 2022).
- Judgment exonerating (no liability) fishing vessel owner for improperly filed Jones Act case. *In re G&J Fisheries, Inc.*, 570 F. Supp. 3d 8 (D. Mass. 2021) and \_\_\_ F.Supp.3d \_\_\_, 2022 WL 1157420 (D. Mass. 2022).
- Dismissal of action seeking to sever ongoing arbitration pursuant to G.L. c. 251, § 2A. *Shamrock Fisheries, LLC v. BASE, Inc.*, C.A. No. 21-891 (Bristol Sup. Ct., Doc. No. 24, March 30, 2022).
- After lengthy trial, dismissal of right whale advocate's Endangered Species Act case seeking to ban commercial lobstering with traditional gear. *Strahan v. Massachusetts Executive Office of Energy and Env. Affairs*, C.A. No. 19-10639-IT (D. Mass., Doc. No. 612, Nov. 30, 2021).
- Final judgment compelling arbitration of right of first refusal claim against nonsignatory to groundfish sector membership agreement. *The Shamrock Group et al. v. BASE, Inc.*, 2021 WL 5630834 (Mass. Super. Ct. May 3, 2021).
- Summary judgment in favor of fishing vessel owner (no liability) on deckhand's claim for maintenance and cure. *G&J Fisheries, Inc. v. Peter Amaral et al.*, 2020 U.S. Dist. LEXIS 226118 (D. Mass. Oct. 15, 2020).
- Dismissal of warranty claim against manufacturer of a bow thruster for lack of personal jurisdiction. *Ace American Insurance Co. v. Oyster Harbors Marine, Inc.*, 310 F.Supp.3d 295 (D. Mass. 2018).
- Dismissal of claims for cleanup and removal expenses against contract operator of naval ship under the Oil Pollution Act of 1990. *Ironshore Specialty Insurance Co. v. U.S.A.*, 2016 WL 10651867 (April 19, 2016). Affirmed on appeal. *Ironshore Specialty Insurance Co. v. U.S.A.*, 871 F.3d 131 (1st Cir. 2017).
- Arbitration Award and Judgment exceeding \$3.5 Million on behalf of Mexican Tug & Barge Company in unpaid charter hire. *CHM Maritime SAPI de CV v. Micoperi, SrL*, 15-CV-13092-ADB (D. Mass. 2015); *Micoperi, S.r.L. v. CHM Maritime SAPI de CV*, 15-CV-10296-ADB (D. Mass. 2015).
- Summary judgment in favor of hull insurer (no liability) for insured's breach of the lay up warranty in yacht policy. *New Hampshire Insurance Company v. Rinkem, Inc.*, 2015 WL 12964338 (D. Mass. October 21, 2015).
- Summary judgment in favor of cargo insurer (no liability) for Dominican lost textiles exceeding \$2 Million under warehouse endorsement. *Eveden, Inc. v. Northern Assurance Company of America*, 2014 WL 952643 (D. Mass. March 12, 2014).
- Defense verdict in favor of ship owner (no liability) in wrongful death action brought by Harbor Pilot. *Cordes v. M/V BALDOCK*, 2013 WL 1282842 (D. Mass. March 29, 2013).
- Defense verdict in favor of passenger vessel owner (no liability) in crewmember Jones Act case. *Stovich v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 08-CV-10202-RWZ (D. Mass. September 8, 2010);
- \$8.5 Million Judgment for cleanup and removal costs on behalf of vessel owner under the Oil Pollution Act of 1990. See *In re Alex C. Corp.*, 2010 WL 4292328 (D. Mass. November 1, 2010).
- Summary judgment in favor of carrier for unpaid freight based upon the carrier's filed tariff. *Horizon Lines, LLC v. Expert Forwarders, Inc.*, 2009 WL 2578981 (W.D. Wash. August 19, 2009).

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