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# Are Communications with Public Officials Barred by DR 7-104?

BY ROY SIMON

Over the years, NYPRR has carried many columns about the no-contact rule, codified as DR 7-104 in New York (and as rule 4.2 in jurisdictions that have adopted the ABA model rules). Articles by me and by others in NYPRR's pages have addressed such topics as (a) the fundamentals of the no-contact rule, (b) interviewing an adversary's current employees, (c) interviewing an adversary's former employees, (d) hiring an adversary's former employee, (e) covert investigations and the no-contact rule, and (f) the significant variations in judicial interpretation of the no-contact rule from jurisdiction to jurisdiction despite the uniform language of the rule around the country.

This time we explore an entirely new issue: how does the no-contact rule apply to communications with government officials? For example, if Lawyer A represents a developer seeking to influence the City Council to approve a shopping center, and the City Council is represented by counsel, may Lawyer A ethically communicate with individual City Council members without the prior consent of City Council's attorney? If Lawyer B represents an office machine vendor who hopes the mayor's office will approve a contract to supply copying machines, may Lawyer B ethically communicate with the mayor about the potential contract over the objection of the mayor's lawyer? The two fundamental questions are (1) whether the public officials are "parties" within the meaning of DR 7-104(A)(1), and (2) if so, whether the communications are nevertheless "authorized by law" under the First Amendment. This article will review the evolution of the ethics rules and opinions on this topic in New York.

The first ABA version of the no-contact rule was found in Canon 9 of the old ABA Canons of Professional ethics, which were adopted exactly a century ago, in 1908. Canon 9, entitled "negotiations with opposite Party," provided as follows:

> 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.…

(Obviously, the old Canon 9 has nothing to do with Canon 9 in our current Code of Professional responsibility.) No New York ethics opinion addressed the relationship between communications with government parties and the no-contact rule as set out in old Canon 9.

In 1970, New York abandoned the old Canons of Professional ethics and adopted the ABA model Code of Professional responsibility. As originally adopted, DR 7-104(A)(1) provided as follows:

(A) During the course of his representation of a client a lawyer shall not

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Today's version of DR 7-104(A)(1) is identical to the original version, except that the male "he" has been replaced by the gender-neutral phrase "the lawyer."

The earliest New York opinion regarding the relationship between DR 7-104(A)(1) and communications with public officials was N.Y. State 160 (1970), written the same year that New York adopted the Code of Professional responsibility. opinion 160 posed a simple question: "Does the Code of Professional responsibility, DR 7-104 (A) (1), permit a lawyer to communicate with an adverse party who is a public officer or board member?" In those days the N.Y. State Bar ethics committee wrote short opinions, and after quoting DR 7-104(A) in full, the Committee's entire answer to the question was as follows:

> This section of the Code is substantially similar to former Canon 9 and has not changed existing opinions except to permit in certain jurisdictions, that which is specifically authorized by law.
>
> A governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual. The attorney for a governmental unit and opposing counsel must abide by the provisions of DR 7-104.
>
> Therefore, once there is an indication that counsel has been designated by a party, whether a governmental unit or otherwise, with regard to a particular matter, all communications concerning that matter must thereafter be made with the designated counsel except as provided by law.

## Overriding Public Interest

Five years later, in N.Y. State 404 (1975), the N.Y. State Bar ethics committee applied the no-contact rule to communications with school board members. The question posed was concrete: "Where a board of education is split on a decision, may an attorney representing a petitioner reviewing that decision contact the minority members of the board in connection with such proceedings without the consent of the board's attorney?" After a perfunctory nod to N.Y. State 160 and its command that a "governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual," the Committee radically construed DR 7-104(A)(1), opining as follows:

> … A crucial question is whether an individual member of a public body must be considered an adverse party in regard to a decision he opposed.
>
> The overriding public interest compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. Minority members of a public body should not, for purposes of DR 7-104(A)(1), be considered adverse parties to their constituents whom they were selected to represent.

> Thus DR 7-104(A) (1) is read as implicitly creating a limited exception to its otherwise broad prohibitions because a public body is involved … [emphasis added.]

The Committee noted that in California, a statute (Business and Professional Code § 6076) expressly provided that the no-contact rule's prohibition against communications with adverse parties "does not apply to communications with a public officer, board, committee or body." The N.Y. State Bar ethics committee thus accomplished by artful interpretation what California had done by statute. The ethics committee's only caution was that – absent consent from opposing counsel – "communications with members of a public body in an adversary proceeding should be made only in instances where the public official has indicated his or her desire to speak with opposing counsel."

The next mention of the issue of communications with government officials came in N.Y. City 80-46 (1980). There, the committee analyzed "the extent to which a lawyer may interview employees of a corporate adversary in litigation, where that adversary is represented by counsel." After addressing that issue at length, the committee said, "[W]e do not address the scope of DR 7-104 (A) (1) where a governmental, as opposed to private, party is involved." But the committee noted the split in authority between N.Y. State 160 and N.Y. State 404.

## The New York City Bar Weighs In

In the late 1980s and early 1990s, in two opinions, the New York City Bar ethics committee finally confronted the issue head-on. The first opinion was N.Y. City 1988-8 (1988). There, the inquirer represented a client in the midst of a dispute with a governmental agency. The agency had retained private counsel for the matter. The inquirer requested the opportunity to submit comments to the head of the agency regarding the agency's exercise of its authority in the matter, but a staff attorney for the government agency objected to the request on grounds that such communication would constitute an ethical violation. The staff attorney indicated that the head of the agency was "acting in a private capacity" in connection with the matter even though he was authorized by statute to act in such matters. The inquirer asked whether he could ethically contact the head of the governmental agency to request that the agency "exercise its discretionary authority favorably" with respect to the client's matter. The inquirer said that he fully intended "to notify private counsel of any such contact and to provide counsel with copies of whatever papers he submits."

The City Bar ethics committee began its analysis by noting that "the determination of whether the head of the agency is acting in a private or an official capacity is one that the inquirer must make, as it is a question of law and fact beyond our jurisdiction." Then, after reviewing earlier authorities addressing the question, the committee said:

> In our opinion, should the inquirer conclude that the head of the agency is acting in an official capacity, then pursuant to the "authorized by law" exception to DR 7-104, he may submit comments to the head of the agency concerning the subject matter of the representation, provided that he notifies the government's private counsel of the intended communication and that he provides counsel with copies of the submissions. in so deciding, we have balanced carefully the competing interests of providing the government with the same protections that are afforded to other parties with the need to ensure relatively unrestricted public access to government. [Citations omitted.]

> If, however, the inquirer concludes that the head of the agency is acting in a private capacity, then he may not communicate with that person, unless he has the consent of opposing counsel or is authorized by law to do so.

Three years later, in N.Y. City 1991-4, the City Bar elaborated on this reasoning. By that time, the New York Court of Appeals had decided *Niesig v. Team I*, 76 N.Y.2d 363, 374-75, 559 N.Y.S.2d 493, 498 (1990), which is still the leading case on various issues arising under DR 7-104(A)(1). The issue in N.Y. City 1991-4 was "whether the same restrictions of DR 7-104(A)(1) apply where the defendant in a lawsuit is a government agency." The inquirer represented a former prison guard who had been terminated for hitting a prisoner. The former guard was now challenging his discharge. The agency (the prison) alleged that the guard had struck the prisoner without justification, but the guard claimed that he had acted in self-defense. The agency was represented by counsel, but the inquiring attorney wanted to interview various government employees "outside the presence of, and without notice to, the agency's counsel," including (i) other guards who witnessed the incident and (ii) the prison warden and other agency officials who had "supervisory responsibility" over the terminated guard and whose acts or omissions might therefore be imputed to the agency for purposes of liability. In addition, the inquirer asked about "ex parte communications with agency officials who may have authority to settle the dispute."

## Applying *Niesig*

The committee first reviewed the *Niesig* decision in detail, quoting its now-familiar test to determine who is a "party" under DR 7-104(A)(1):The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.

Applying the *Niesig* test, the committee readily concluded that the inquiring attorney could ethically "interview guards who are merely witnesses to the incident, outside the presence of and without notice to the agency's counsel, so long as the inquirer clearly identifies himself and his interest to the persons being interviewed." But supervisory officials at the agency were a different story. Because "their acts or omissions may be imputed to the agency for purposes of liability," the committee concluded that the inquirer "may not interview such persons outside the presence of and without notice to the agency's counsel."

The committee then turned to the second part of the inquiry – whether the inquirer could ethically engage in "ex parte communications with agency officials who may have authority to settle the dispute." The committee noted that the communications approved in N.Y. City 1988-8 (supra) had been "specifically limited to comments intended to persuade an agency head to exercise discretionary authority in the resolution of a dispute." The inquiring lawyer there did not seek to interview or to obtain the statement of any governmental official outside the presence of counsel for the government, and had intended to give the agency's counsel copies of whatever papers he submitted. Citing N.Y. City 1988-8 and N.Y. State 160, the committee repeated the principle that "a governmental unit has the same rights and responsibilities in a controversy as does any other party," including the right to representation by counsel, and the government's right to representation "might be impaired if DR 7-104(A)(1) were held never to apply to communications by an adversary lawyer with policy-making government officials."

Thus, in the context of specific litigation, the committee concluded that (a) "DR 7-104(A)(1) applies where the opposing party is a government agency," and (b) govern-mental employees deemed to be "parties" for purposes of DR 7-104(A)(1) "are those individuals satisfying the test set out in *Niesig."*

## Communications Authorized by Law

But that was not the end of the inquiry. The committee now turned to DR 7-104(A)(1)'s "specific exemption" for communications "authorized by law," a category that obviously included communications protected by the First Amendment. The Committee expressed "no view" as to whether First Amendment rights might override DR 7-104(A)(1), and noted that the interplay between constitutional rights and DR 7-104(A)(1) might vary depending upon (i) "the nature of the claim asserted," (ii)" the purposes sought to be served by the intended communication," and (iii) "the status of the government official with whom the private litigant's lawyer wishes to communicate." The right to petition the government for the redress of grievances might override DR 7-104(A) even in pending litigation "where the private litigant's lawyer wishes to persuade a governmental decision-maker to interpret or apply governmental policy in a particular way." Nonetheless, the committee said, it should be possible to reconcile the right to petition with the values of fair play underlying DR 7-104(A)(1):

> … We believe such a compromise would be achieved, for example, where counsel addresses written comments to the governmental decision-maker, with a copy sent to the official's counsel in the litigation and in which communication counsel clearly states that (i) the matter being addressed is in litigation and (ii) the official may wish to consult government counsel in the litigation before responding. Such a communication could include a request to meet with the public official, but the official's counsel in the litigation should be present at any such meeting.

Balancing the interests, the committee said:

> Government lawyers should not be able to block all access to government officials to the point of interfering with the right to petition for redress, but neither should attorneys be allowed to approach uncounseled public officials who may not know exactly what cases are pending against them, the status of those cases, the consequences of those cases, or the consequences their statements may have in those cases. …

Yet even if a lawyer believed that the First Amendment justified ex parte communications with government officials, a court might disagree and could sanction or even disqualify the attorney and the attorney's entire firm. Since disqualification could seriously harm the client, "it would be prudent for a lawyer desiring to have ex parte communications with government officials for purposes of a lawsuit to consider seeking permission from the court, on notice to the government, to conduct such interviews."

Finally, the committee noted that there may be circumstances in which DR 7-104(A)(1) could require a lawyer to limit or avoid communications initiated by a high-ranking policy maker, but the committee expressly declined to address those questions in N.Y. City 1991-4, and it has not addressed them since.

## The Latest Word: N.Y. State 812 (2007)

The N.Y. State Bar ethics committee got back into the act last year in N.Y. State 812 (2007). There, a shopping center developer's in-house lawyer represented a developer who was seeking land use permits

and approvals from government bodies and whose requests relating to a controversial proposed new shopping center were pending before a town "planning board," which was represented by outside counsel on the shopping center project. The inquiring attorney believed that a majority of the planning board's members op-posed the project, so he wanted to communicate "separately and informally" on behalf of the developer with planning board members who supported the project. The planning board's outside counsel, however, objected to the proposed communications and directed the inquirer to limit his communications to written submissions addressed to the planning board secretary for distribution to the entire board and for inclusion in the administrative record. The developer's in-house counsel therefore asked whether he could ethically communicate "privately, separately, and informally" about the developer's pending applications with individual members of the board who supported the developer's project.

Because the planning board's counsel had not consented, the ethics committee said that the communications were prohibited under the "no-contact" rule unless either (a) the planning board members were not "parties" within the meaning of DR 7-104(A)(1) or (b) the communications were otherwise "authorized by law." The answer to the "parties" question was controlled by *Niesig v. Team I*, which prohibited communications only with those government officials "who have authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose act or omission gave rise to the matter in controversy." Since the planning board had power to issue "binding determinations" regarding the matter before it, the *Niesig* "party" test was satisfied.

However, the proposed communications did not violate DR 7-104(A)(1) because they were "authorized by law." The committee had long recognized an "implicit exception" to the broad no-contact prohibition of DR 7-104(A)(1) where a public body is involved," and most authorities now agreed that the literal language of the no-contact rule "must be tempered by constitutional considerations where the First Amendment right to petition government is implicated …." In ABA 97-408, the ABA had interpreted the no-contact rule to allow unconsented contacts with government officials that the no-contact rule would otherwise prohibit, subject to three conditions:

> First, the official to be contacted must have authority to take or recommend action in the controversy. Second, the sole purpose of the communication must be to address a policy issue. Third, advance notice of the proposed communications must be given to the lawyer representing the government official in the matter so as to afford government counsel the opportunity to advise his or her client with respect to the communication, including whether even to entertain it.

## Notice to Counsel

The committee adopted the ABA's approach. Since the proposed communications fell within the protection of the First Amendment right to petition, they were not prohibited by DR 7-104(A)(1), "provided that counsel for the planning board is given reasonable advance notice that such communications will occur." However, "communications directed to government officials who do not have the authority to take or recommend action in the matter, or communications that are intended to secure factual information relevant to a claim (for example, mere witnesses to government misconduct), should both be fully subject to the no-contact rule" because First Amendment considerations were not at play there.

However, permitted communications were subject to "several important caveats":

> First, we do not opine on whether additional "private," "separate" or "informal" communications with board members may violate a state statute or local ordinance that governs planning board procedures, or whether such communications may implicate a locally adopted ethics code. Second, we do not here address ex parte communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations. Third, the inquirer may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product. Fourth, the inquirer should cease contact with a planning board member if the member so requests.

Generally, however, unless state or local ordinances prohibit or regulate the practice, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members provided: "(a) the proposed communications solely concern municipal development policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications."

## Conclusion: The Exception Swallows the Rule

The no-contact rule is a stringent rule, and any attorney who violates it is likely to receive a harsh rebuke from opposing counsel and risks disqualification. But as N.Y. City 1991-4 and N.Y. State 812 show, communications with adverse government officials are probably "authorized by law" under the First Amendment right to petition the government for redress of grievances as long as (1) the communications concern only policy issues, and (2) the lawyer gives the government's counsel in the matter reasonable advance notice of the proposed communications. That is a reasonable resolution of an arguable question of professional duty, and I hope the courts will honor it so that citizens can freely communicate with their elected and appointed government officials regarding matters of paramount concern. The no-contact rule serves important policy purposes, but government officials are big enough to take care of themselves to prevent abuses, and the no-contact rule should not give government lawyers veto power over First Amendment rights that all citizens should enjoy.

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*Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law and the author of SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, published annually by Thomson Reuters (formerly Thomson West).*

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