

Chief Judge Kaye Leaves A Rich Professional Responsibility Legacy

BY JEREMY R. FEINBERG

By the time you read this article, Chief Judge Kaye will have retired from the Court of Appeals, ending a long and successful career as a judge. Trying to summarize all the ways she has enriched the law of New York State during her 25 years on the bench would be a daunting task. Given the nature of this publication, however, I thought it would be appropriate to focus on a few of the prominent ethics decisions she authored and their effect on the way lawyers practice in this state.

There are many Chief Judge Kaye-authored ethics cases – well over a dozen, depending on how you count. I have written elsewhere on one of them: see Jeremy R. Feinberg, *Jamaica Public Service Co.*, 1998, NY St Bar J, November/December 2008 at 24-25. Here, I will discuss just four additional decisions: *Niesig v. Team I*, 76 NY2d 363 (1990) (Kaye, J.); *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 NY2d 371 (1991) (Kaye, J.); *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437 (1987) (Kaye, J.); and *Tekni-Plex, Inc. v. Meyner and Landis*, 89 NY2d 123 (1996) (Kaye, C.J.).

Niesig v. Team I

A practitioner grappling with DR 7-104, also known as the “no contact rule,” would be hard-pressed to find interpretative authority in the past 18 years that did not cite *Niesig*. Indeed, a search run as of this writing indicated that well over 100 decisions and 16 bar association ethics opinions have cited and/or applied *Niesig* so far. That decision not only answers a key question in applying the no-contact rule – i.e., which employees of a party are considered “represented” and therefore within DR 7-104’s reach – but it also outlines a number of oft-cited policy considerations behind the rule, defining the balance between the interest in full disclosure and the need to protect the attorney-client relationship.

Niesig involved a discovery dispute in what at first blush appeared to be an ordinary personal injury action resulting from plaintiff’s fall from a scaffold at a building construction site. But as then-Judge Kaye noted in her opening paragraph, the case nonetheless had generated widespread interest, and many amicus briefs, on an open question: “are the employees of a corporate party also considered ‘parties’ under Disciplinary Rule 7-104(A) (1) of the Code of Professional Responsibility, which prohibits a lawyer from communicating directly with a ‘party’ known to have counsel in the matter?” *Niesig*, 76 NY2d at 367-68.

Plaintiff’s counsel sought permission to conduct ex parte interviews of all of the third-party defendant’s employees who were on the construction site at the time of the accident, arguing that none of these people was a managerial or controlling employee, and that, therefore, they all fell outside the reach of the Disciplinary Rule. The motion court denied the request. In affirming, the Appellate Division concluded that all current employees of the corporate party should fall within the scope of DR 7-104, “for theoretical

as well as practical reasons,” particularly in light of the “difficulties of distinguishing between a corporation’s control group and its other employees.” *Niesig*, 76 NY 2d at 368. The Court of Appeals disagreed.

As a starting point, Judge Kaye noted that when construing disciplinary rules, as opposed to statutes, the Court is “not constrained to read the rules literally or effectuate the intent of the drafters.” Unlike statutes, and while ... “unquestionably important, and respected by the courts, the code does not have the force of law.” *Id.* at 369. With that as a backdrop, and having set forth the history of and purposes behind DR 7-104, Judge Kaye wrote that the issue boiled down to “which corporate employees should be deemed parties for purposes of DR 7-104(A) (1), and that choice is one of policy.” *Niesig*, 76 NY 2d at 371. The parties, supported by bar associations and commentators, proposed two diametrically opposed rules: either to apply DR 7-104, as the Appellate Division had, to all current employees of the corporate party (*Niesig*, 76 NY2d at 371), or to limit the scope of DR 7-104 to those few employees in the “control group” of the employer, i.e., “only the most senior management exercising substantial control over the corporation”. *Id.* at 373.

Judge Kaye, writing for the Court of Appeals, rejected both proposals – the former as overly broad and contrary to the important policy of permitting informal access to non-privileged information (*id.* at 372-73) and the latter for “all but ‘nullifying the benefits of the disciplinary rule to corporations.’” *Id.* at 373, citations omitted. Instead, after passing over several other intermediate tests, the Court held that the word “party” should apply in the corporate context 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.” *Id.* at 374.

This rule, according to the Court, would allow access to employees who were mere witnesses to the underlying events for which their employer was sued. It would both strike “the correct balance” and become “relatively clear in application.” *Id.* at 375. But Judge Kaye, although articulating a clear rule and policy, recognized that the court’s function is not that of a legislature or rule-making body, and pointedly reminded readers that all of the Court’s decisions, “are limited by the facts before us and the questions put to us.” *Id.* at 376. To guard against potential overreaching by those conducting the witness interviews, Judge Kaye also noted that “while we have not been called upon to consider questions relating to the actual conduct of such interviews, it is of course assumed that attorneys would make their identity and interest known to interviewees and comport themselves ethically.” *Id.*

This last line foreshadowed much of the case law and substance of bar committee ethics opinions that have followed in the subsequent 18 years. *See, e.g.*, NY C Bar Op. 2007-1 (outlining factors relevant to question: Is lawyer permitted to speak with in-house counsel for party without advance permission from outside counsel); NYC Bar Op. 2005-4 (lawyer not permitted to speak with sophisticated claims adjuster for insurer defendant absent permission from insurer’s counsel). Indeed, the two most recent Court of Appeals cases to address DR 7-104, *Muriel Siebert v. Intuit*, 8 NY3d 506 (2007) and *Arons v. Jutkowitz*, 9 NY3d 393 (2007), continued where *Niesig* left off, and expanded on its themes.

Spectrum Systems v. Chemical Bank

Spectrum Systems also involved limits on pre-trial disclosure – addressing whether the attorney-client privilege, work product, or other protections shielded an investigative report defendant Chemical Bank’s outside counsel prepared after discovery. The lower courts said no. The question before the Court of Appeals was whether a report which did not focus on imminent litigation, reflected no legal research, and reached no conclusion regarding Chemical’s legal position, should be shielded from discovery.

Judge Kaye focused primarily on the attorney-client privilege in this decision, describing that privileges’ history, purposes, and limitations. In language that is frequently cited, the opinion reiterated that because of the policy favoring full disclosure, the burden of establishing the privilege is on the party asserting it. In particular, “the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity.” *Spectrum Systems*, 78 NY2d at 377. Turning to the elements that need to be established to successfully assert the privilege, the opinion also held that “[i]n order for the privilege to apply, the communication from attorney to client must be made ‘for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.’ The communication must be primarily or predominantly of a legal character”. *Id.* at 378, quoting *Rossi v. Blue Cross & Blue Shield*, 73 NY2d 588, 593 (1989).

Turning to the document at issue in *Spectrum Systems*, Judge Kaye noted that there was no dispute that the report was confidential, and was prepared by counsel in furtherance of an attorney-client relationship. Rather, the issue turned on whether the law firm’s investigative function was different from, and inconsistent with, conveying legal advice to a client. *Spectrum Systems* 78 NY 2d at 378. Judge Kaye noted that the investigative report contained non-privileged information, such as matters relating to Chemical’s future business operations, but wrote, “[t]hat non-privileged information is included in an otherwise privileged lawyer’s communication to its client – while influencing whether the document would be protected in whole or only in part – does not destroy the immunity. In transmitting legal advice and furnishing legal services it will often be necessary for a lawyer to refer to nonprivileged matter.” *Id.* (citation omitted).

Taking a realistic approach, and recognizing that privilege determinations are fact-sensitive, the opinion held that the privilege must protect more than those documents in which a lawyer merely recites the confidences supplied to the client. Such an approach “is at odds with the underlying policy of encouraging open communication; it poses inordinate practical difficulties in making surgical separations so as not to risk revealing client confidences; and it denies that an attorney can have any role in fact gathering incident to the rendition of legal advice and services.” *Id.* at 379 (emphasis in original).

Applying these considerations, the *Spectrum Systems* court ultimately concluded that the law firm selected and presented the nonprivileged facts “as the foundation for the law firm’s legal advice, and that the communication was primarily and predominantly of a legal character.” *Id.* To this end, the Court deemed it irrelevant that the report did not focus on imminent litigation, did not reflect any legal research, and did not reach a conclusion as to the parties’ legal positions. “None of these factors changes the privileged character of the document.” *Id.*

The holding in this decision was accompanied by a clear and extensive discussion about the attorney-client privilege. Although privilege determinations remain a difficult and frequent subject of motion practice before trial courts, the Spectrum Systems decision has helped narrow and crystallize the issues for litigants and judges alike.

S&S Hotel Ventures v. 777 S.H. Corp.

Privilege motions, such as the one the Court of Appeals examined in Spectrum Systems, are not the only way in which ethics issues reach the courts. Indeed, the disqualification motion, which seeks to remove a lawyer or law firm from a case, may be all too familiar in the trial courts. One type of disqualification motion, involving the “advocate-witness” rule, was presented in *S&S Hotel Ventures*. Judge Kaye took the opportunity to define the contours of that rule, and also set forth guidelines for considering disqualification motions generally.

In *S&S Hotel Ventures*, plaintiff sued for breach of contract and tortious interference with contract, resulting from defendant’s alleged failures to comply with the terms of a promissory note and deed of trust. Well into the discovery period, defendant sought to disqualify plaintiff’s law firm primarily on the ground that one lawyer who was “of counsel” to that firm “ought to be called as witness[es] at trial on behalf of plaintiff.” *S&S Hotel Ventures*, 69 NY2d at 441. Indeed, that lawyer had formerly been the sole general partner of the plaintiff partnership, and had participated in negotiating the contract at issue.

The motion court concluded that the lawyer had knowledge of certain potentially relevant transactions and disqualified the firm, despite the partnership’s insistence that the lawyer had no knowledge material to the dispute and would not be called as a witness. The court deemed it “questionable” that the knowledge was material, but resolved doubts in favor of disqualification. Accordingly, it disqualified the firm, but did so only for trial. The Appellate Division, divided 3-2, affirmed, holding that the motion court had struck an appropriate balance under the circumstances. *Id.* at 440-41.

The opening paragraph of Judge Kaye’s opinion made clear the need for reversal and starkly outlined the key considerations for deciding such motions: “[t]he advocate-witness disqualification rules contained in the Code of Professional Responsibility provide guidance, not binding authority, for courts in determining whether a party’s law firm, at its adversary’s instance, should be disqualified during litigation. Courts must, in addition, consider such factors as the party’s valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation.” *Id.* at 440.

Expanding on these themes, Judge Kaye noted that there are many competing concerns presented in a disqualification motion: the right to choose one’s own counsel, which can be overridden in the civil context by a compelling public interest; the risk that disqualification motions may be used tactically to impede ongoing litigation; the need for a lawyer’s judgment to be exercised on behalf of the client free of compromising interests and loyalties; and the unseemliness of a lawyer’s vouching for his/her own credibility. *Id.* at 443-44. With those competing concerns in mind, Judge Kaye wrote, “it is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation. The Code instead provides ‘guidance for the courts in determining whether a case would be tainted by the participation of an attorney or firm.’” *Id.* at 444-45 (citations omitted).

Applying these principles to the motion, Judge Kaye wrote that there was no indication that the lawyer would participate at trial, nor was there any finding by either of the lower courts that the lawyer's testimony was necessary to the plaintiff's case. The mere facts that the witness had "relevant" knowledge and was "involved" in the underlying transactions (as was concededly true in this case) was not enough to satisfy the requirement that the lawyer's testimony be necessary. Reiterating that disqualification was only appropriate in those cases where it is likely that the testimony would be necessary, and distinguishing between necessary testimony, and testimony that is merely relevant and highly useful, Judge Kaye wrote for the court that disqualification was not appropriate on the facts presented. *Id.* at 445-46.

Few practitioners are likely to recall the specific fact pattern of S&S Hotel Ventures, or the role the lawyer at issue played, or even the identity of the law firms and client in this case. Nonetheless the teachings of S&S Hotel Ventures, and in particular its guidance on the limitations of the Disciplinary Rules and the factors to be considered in evaluating a disqualification motion, are certainly memorable and often cited.

Tekni-Plex v. Meyner and Landis

In *Tekni-Plex*, the Court of Appeals carefully parsed the surviving attorney-client relationships and obligations after a corporate acquisition. The fact pattern was complex, to say the least. Meyner & Landis ("M&L") had for many years represented the original company ("Old") and sometimes personally represented Tang, Old's sole shareholder and director, as well. M&L represented Old on certain environmental compliance matters and represented both Tang and Old as sellers in the corporate acquisition. Under the operative merger agreement, there was a transfer of assets, rights, privileges, liabilities and obligations from Old to the acquiring company ("New"), and Old ceased to exist. Subsequently, New commenced arbitration against Tang for breach of warranties regarding the company's compliance with environmental laws. Tang retained M&L, and, by order to show cause in a parallel proceeding in Supreme Court, New moved to (i) disqualify M&L from the representation, (ii) enjoin M&L from disclosing to Tang any information obtained from Old, and (iii) obtain an order directing M&L to return to New all files in M&L's possession concerning its prior representation of Old. The motion court granted New's motion, and the Appellate Division affirmed.

Writing for the Court of Appeals, Chief Judge Kaye distilled this complex fact pattern and attendant legal issues to their essence. First, examining whether or not M&L should be disqualified, the Court set forth a three-part test: a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse. *Tekni-Plex*, 89 NY2d at 131. Recognizing the competing considerations identified in *S&S Hotel Ventures*, including the right to counsel of choice and the risk of "strategic" disqualification motions, Chief Judge Kaye made clear that "[o]nly where the movant satisfies all three [conditions] does the irrebuttable presumption of disqualification arise." *Tekni-Plex*, 89 NY2d at 132 (citations omitted). Applying its three-part test, the Court held that disqualification of M&L was appropriate, concluding that the "appearance of impropriety is manifest and the potential conflict of interest apparent." *Id.* at 136.

Chief Judge Kaye then turned to the unusual privilege issues that the dispute had generated – did New control Old’s attorney-client privilege in matters arising from Old’s former business operations, and could it compel counsel to disclose confidences and secrets from Old’s representation during the merger of Old into New. The Court of Appeals held that New would need access to Old’s attorney-client privilege to address any legal issues arising from Old’s prior operations. On the second question, however, the Court held that New did not control the attorney-client privilege: “[u]nder the Merger Agreement, moreover, the rights of [Old] with regard to disputes arising from the merger transaction remain independent from – and, indeed, adverse to – the rights of the buyer.” *Id.* at 138.

My brief description of her opinions does not (and in the available space, could not) demonstrate the simplicity and precision with which Chief Judge Kaye tackled these knotty issues. Although disqualification motions alone are enough to cause a seasoned ethics practitioner to reach for a bottle of aspirin, adding tricky privilege issues to the mix muddies the waters further. Yet, with her accustomed clarity, the Chief Judge wrote not only in a way that resolved the dispute before her Court, but also provided helpful guidance for the (many) similar issues arising in trial courts around the State.

Even the entire body of ethics decisions Chief Judge Kaye authored during her tenure understates the extent of her impact on the law and lawyers. It’s her character and example – not just her reported decisions or even the rules, policies and programs she has established as Chief Judge – that have helped inspire so many attorneys to strive to do what is right rather than what is merely expedient.

Jeremy R. Feinberg is the Statewide Special Counsel for Ethics for the New York State Unified Court System. He would like to thank his colleague Laura Smith for her insight and suggestions that immeasurably improved this article. The views expressed in this article are those of the author only and are not those of the Office of Court Administration or Unified Court System.