

Four New Opinions On The No-Contact Rule

BY ROY SIMON

I am continually surprised at how frequently courts and ethics committees issue opinions about the so-called “no-contact” rule (DR 7-104 in New York; Rule 4.2 in most other states). The no-contact rule, which has the same text in most states, prohibits a lawyer from communicating with a represented party unless the lawyer is “authorized by law” to do so or has obtained advance consent from the represented party’s lawyer.

NYPRR has addressed the no-contact rule and its various applications in several previous issues. *See, e.g.,* Roy Simon, *Should Government Lawyers Talk to My Client?* (May 1998); Bruce Green, *The “No-Contact” Rule in New York State — Some Less Contentious Questions* (August 1998); Hal Lieberman, *The Anti-Contact Rule and Subordinate Employees* (January 2000); and Roy Simon, *Undercover Investigators & The Disciplinary Rules* (January 2000). One would think that the meaning of the rule would by now be clear in most situations. Yet because so much is at stake, litigants continue to fight over the rule and its implications.

This year alone, the on-line versions of the *ABA/BNA Lawyers’ Manual on Professional Conduct* and the *New York Law Journal* have highlighted at least five new court cases interpreting the no-contact rule -- including three from New York. (One of these cases, *G-1 Holdings, Inc. v. Baron & Budd*, was described in the May issue of NYPRR.) This article discusses four of the new opinions and attempts to draw some lessons for New York attorneys.

Who is “Represented by a Lawyer”?

The pivotal issue in many of the no-contact cases is whether the person contacted is “represented by a lawyer.” When the person is an individual, this issue is usually pretty easy — either an individual has a lawyer or he doesn’t. But when the person being interviewed is a member of a putative class action, an employee of a government agency, or an employee of a corporation, it’s often hard to know whether she is a “party” who is “represented by a lawyer,” or is instead just an ordinary witness who is not represented by counsel.

The New York Court of Appeals, of course, weighed in on this subject more than a decade ago, in *Niesig v. Team I*, 76 N.Y.2d 363 (1990) (Kaye, J.). That case arose out of a construction site accident. Plaintiff’s counsel sought the trial court’s permission to informally (and privately) interview a corporate defendant’s employees who witnessed the accident. The trial court denied the request, and the Appellate Division affirmed, concluding that all current employees of a corporate defendant in litigation “are presumptively within the scope of the representation afforded by the attorneys who appeared on behalf of that corporation.” The Court of Appeals reversed, stating:

The test that best balances the competing interests ... 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.

Unfortunately, this test has proven difficult to apply. Moreover, under DR 1-105(B), New York's choice-of-law rule in disciplinary matters, New York's test does not apply to litigation in other states, where the rules may be very different.

When the State is a Party

Schmidt v. State of New York, 2000 N.Y. App. Div. LEXIS 13547 (4th Dep't 2000), was decided during the last week of 2000 and made headlines early in 2001. Claimants had been seriously injured in a car accident. They promptly served the Attorney-General with a notice of intention to file a claim, alleging that the accident was caused by a faulty traffic signal installed and maintained by the New York State Department of Transportation ("DOT"). An investigator employed by claimants' counsel interviewed the DOT crew that had repaired the signal on the day of the accident. Soon thereafter, claimants filed a claim alleging that the signal crew's negligence caused the accident. The State moved to preclude the use of the statements and to disqualify claimants' counsel. Claimants opposed the motion, contending that the Attorney-General had not established an attorney-client relationship with the DOT or with the signal crew employees at the time the interviews were conducted. The Court of Claims denied the State's motion, and the Fourth Department affirmed, on three grounds.

First, the Fourth Department agreed that the DOT employees were not represented by the Attorney - General when the interviews took place. Technically, "the State of New York is always represented by counsel." But if a state agency were always deemed to be represented by counsel for purposes of DR 7-104(A)(1), "the free exchange of information between the public and the government would be greatly inhibited." The Fourth Department therefore agreed with the Court of Claims that, "until the Attorney General actually speaks to, or corresponds with, the employees involved or provides them with privileged information about the case, the employees are not 'represented by a lawyer in [the] matter'"

Second, the court concluded that "the service of the notice of intention did not trigger representation of the DOT by the Attorney-General." If it did, DR 7-104(A)(1) might inhibit claimant's counsel from investigating a possible claim, which would be unwise policy. Moreover, at no time during the 20 months from the service of the notice of intention to the time that the interviews were conducted did the Attorney General advise claimants' counsel that his office represented the DOT and that the employees who comprised the signal crew should not be interviewed.

Third, even if there had been an attorney-client relationship at the time of the interviews, "we would nevertheless conclude that claimants' counsel is not chargeable with knowledge that the employees were 'parties' or that they were represented by the Attorney-General." It was not disputed that the DOT employees are now "parties" as that term is defined in *Niesig, supra*, because their acts or omissions may be imputed to defendant for purposes of its liability. However, this case presented an issue not addressed by *Niesig*, namely, "the point at which a governmental party is in fact 'represented by a lawyer in [a] matter ' for purposes of triggering the ethical restraints of DR 7-104(a)(1)." DR 7-104(A) has been held to apply to a lawyer who "knew or should have known" that the party contacted was represented by counsel. Here, however, no action was pending when the employees were interviewed, and claimants' counsel was conducting an investigation to determine whether the DOT was likely to have any

liability. The DOT employees might tell the investigator that the signal was properly aligned, or that it was misaligned by a cause unrelated to the signal crew. Those responses would not impute liability to the State. The Attorney-General is in a better position than claimants' counsel to know which employees are "parties," because claimants' counsel can only obtain that information through an investigation — as was done here. "We do not suggest that claimants' counsel may interview anyone, irrespective of counsel's knowledge of the employees' status, simply because a claim has not yet been filed and served." DR 7-104(A)(1) will still apply if claimants' counsel "knew or should have known that the person interviewed is an employee-party and is represented by counsel" — but that was not the case here. (Two judges dissented.)

When the Defendant is Insured

In *McHugh ex rel. Kurtz v. Fitzgerald*, 719 N.Y.S.2d 785 (3d Dep't 2001), the infant plaintiff, Patrick McHugh, had been bitten by a dog and retained Finkelstein, Levine, Gittelsohn & Partners to represent him. The law firm wrote a letter to defendant Patricia Fitzgerald, upon whose premises the dog bite occurred, asking to hear from her insurance carrier, State Farm Insurance Company. A State Farm representative contacted the law firm seeking medical information. Thereafter, the law firm filed suit. The day after filing suit, an investigator for the law firm contacted defendant at her house and obtained an affidavit in which defendant stated that the dog in question had bitten another person before the incident giving rise to this lawsuit. It is undisputed that the defendant was not represented by counsel when this affidavit was obtained. Later, counsel retained by State Farm moved to preclude plaintiffs from deposing defendant regarding any of the facts contained in the affidavit or from using the affidavit as evidence at trial. The Supreme Court, without issuing a written decision, granted defendant's motion, apparently agreeing with defendants that plaintiffs' investigator had obtained the defendant's affidavit in violation of DR 7-104(A)(1).

The Third Department reversed, stating that DR 7-104(A) does not apply just because the law firm knew that defendant was insured and should have anticipated that the insurance carrier would provide her with legal representation at some point in time. "The rule quite plainly proscribes communication when the lawyer knows the party to be represented by a lawyer in the matter. Here, there is no question that defendant was not represented at the time she was interviewed and per force of fact the law firm could not be in violation of the rule."

When Witnesses Are Putative Class Members

In *Dondore v. NGK Metals Corp.*, 2001 WL 360151 (E.D.Pa. 2001), the court considered whether the no contact rule protects putative members of a plaintiff class before the class has been certified. In separate individual federal tort suits, plaintiffs Dondore and Conrad alleged that defendants NGK Metals Corporation, Cabot Corporation, and others had operated a beryllium metal manufacturing facility near plaintiffs' homes for nearly 65 years, causing plaintiffs to suffer from chronic beryllium disease. During discovery, defendant Cabot's attorney sought to speak informally to plaintiffs' neighbors about their knowledge of plaintiffs' exposure to beryllium.

In a separate state court class action arising out of the same events, the putative class members included all residents who had ever resided within six miles of the beryllium plant for at least six continuous months between 1950 and 1989.

The state court had not yet decided the issue of class certification. However, it was clear that the neighbors Cabot's federal counsel wanted to interview were members of the putative class. The court therefore had to decide whether putative members of an uncertified class were protected by Rule 4.2, Pennsylvania's version of the no-contact rule, which is virtually identical to New York's DR 7-104(A)(1). The court said this depended on the answers to three questions:

First, are the potential witnesses whom defense counsel seeks to interview "represented by another lawyer"? In other words, are the federal tort actions part of the same matter as the state action? Finally, does Cabot's lawyer seek to "communicate about the subject of the representation," or is the proposed interview about separate and independent issues?

The second and third questions were easy to answer. The parties agreed that the state action and the individual federal tort cases concerned the same matter, and the court determined that the proposed communications would necessarily address issues that "overlap" between the federal and state cases. "Whatever the potential witnesses might say about their knowledge of the health and beryllium exposure of Mrs. Conrad and Mrs. Dondore," the court said, "will necessarily include the witnesses' knowledge about their own exposure to beryllium" The key question, therefore, was there first one: were the potential witnesses, who were also putative class members, "represented" by the lawyer for the named plaintiffs in the uncertified state class action?

The court thought that they were. Putative class members stand "at least in a fiduciary relationship" with class counsel. "The mere initiation of a class action extends certain protections to potential class members," whom the U.S. Supreme Court has characterized as "passive beneficiaries of the action brought in their behalf." Moreover, under Pennsylvania law, putative class members are "properly characterized as parties to the action." Between the filing of the action and the certification of the class, unnamed class members "have certain interests in the lawsuit. For example, they may challenge the adequacy of representation by the named plaintiff, or have a right to be included in any settlement; and the statute of limitations may be tolled during the period." In sum, putative class members are entitled to certain rights and protections, "including, we believe, the protections contained in Rule 4.2" Restraints are needed against communications with putative class members until the issue of class certification can be determined. "The court held that Rule 4.2 "prohibits defense counsel from contacting or interviewing potential witnesses who are putative class members ... without the consent of counsel for the named plaintiffs" Of course, Cabot remained free to subpoena and depose witnesses in the federal tort suit, and if the state court ultimately decides not to certify a class, then Rule 4.2 will no longer restrict Cabot's communications with any potential witnesses who are not individually represented by counsel.

Massachusetts Takes a Stricter Approach

In *Stanford v. President & Fellows of Harvard College*, 2000 WL 1725424 (Mass. Super. 2000), a female member of the Harvard University Police Department ("HUPD") alleged that she had been denied a promotion because of her gender. To investigate her claims, her attorneys contacted five other HUPD police officers and obtained sworn affidavits from them. When Harvard's attorneys found out about this, they sought sanctions against plaintiff's lawyers for violating Rule 4.2 and its predecessor, DR 7-104(A). Harvard argued that these ethical rules prohibited plaintiff's lawyers from contacting any current HUPD employees to discuss any subject within the scope of their employment. The thrust of Harvard's argument was that "any present employee" of HUPD could make a statement that would bind Harvard

under the rules of evidence or under the common law of master and servant, and every current employee was therefore a “party” for purposes of DR 7-104.

The Massachusetts court sided with Harvard. Discussing a long line of Massachusetts authorities including a Massachusetts Bar ethics opinion expressly rejected by *Niesig*—the court noted that interpretations of the no-contact rule in Massachusetts were “strikingly protective of corporations regarding employee interviews.” The court therefore concluded that the rule was “intended to forbid ex parte communications with all institutional employees whose acts or omissions could bind or impute liability to the organization or whose statements could be used as admissions against the organizations, presumably pursuant to Federal Rule of Evidence 801(d)(2)(D).” The court agreed with the plaintiff that two of the leading court decisions had set forth “a case-by-case balancing test to determine whether to authorize ex parte contact”—but plaintiff’s reliance on those decisions was misplaced because the issue before the courts was “not to define who the attorney could contact without the permission of the organization’s counsel, but whether to provide authorization to permit the ex parte contact as an exception to the general prohibition on such contact.” Moreover, the court noted, the earlier decisions “emphatically note that the court, not counsel, performed the relevant balancing test.” Here, in contrast, plaintiff’s lawyers acted “unilaterally.” In such an “uncertain area of ethical conduct,” a prudent attorney “would have given notice to opposing counsel of the intent to take such a statement and/or have come to court for permission to do so.” Plaintiff’s attorneys did neither.

The bottom line was that the interviews by plaintiff’s lawyers were “improper,” and the court granted Harvard’s motion to prohibit plaintiff’s attorneys from making any further use of any statement given by the five affiants. The court denied Harvard’s motion to disqualify the offending attorneys, but the court ordered plaintiff’s attorneys to pay “all of Harvard’s attorneys’ fees and costs in litigating this motion for sanctions.” In April of 2001, the case grabbed headlines when the court, pursuant to its sanctions order, ordered the plaintiff’s attorneys to pay Harvard more than \$94,000 in fees and costs.

Lessons for New York Attorneys

New York attorneys can learn four main lessons from the potpourri of judicial decisions and ethics opinions sketched out above.

First, the interpretation of the no-contact rule remains very much a state-by-state affair. Even though the text of the rule is likely to be almost identical from one state to the next, the interpretation of the rule differs greatly. For litigators in particular, it is crucial to research the meaning of the no-contact rule in each jurisdiction where litigation is pending.

Second, the meaning and operation of the no-contact rule varies from context to context. An interpretation that works in the context of a class action may not work in the context of a suit against a state agency or a visit to a web site.

Third, the meaning of the no-contact rule is evolving over time. Courts and ethics committees are producing a steady stream of opinions interpreting the rule, and it is important to check the latest offerings before engaging in *ex parte* communications with those who may be within the sweep of the no-contact rule.

Fourth, opposing attorneys are eager to seek sanctions for violations of the no-contact rule, including suppression of evidence, disqualification, and monetary sanctions—and courts are often willing to oblige if they find a violation.

In sum, it pays to pay attention to the nuances and frequent developments in the scope and meaning of the no-contact rule. Lawyers who fail to do so are taking great professional risks.

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