

## 'Party' vs. 'Person' In DR 7-104(A)

BY ROY SIMON

**M**ay the prosecutor or defense lawyer in a criminal case interview a non-party witness who has relevant information if the witness is represented by her own counsel? Two recent cases, *People v. Quiroz*, 2007 WL 1247257 (Nassau County Dist. Ct., April 18, 2007), and *People v. Kabir*, 13 Misc.3d 920, 822 N.Y.S.2d 864 (Bronx County Supreme Ct., Oct. 19, 2006), address this question. This article reviews the decades of debate over "party" vs. "person" in New York's no-contact rule and analyzes the two recent cases.

### **Background: From the Canons to the Code**

The prohibition on communicating with represented parties goes back at least to 1836, when David Hoffman published the first American ethics code, "Fifty Resolutions in Regard to Professional Deportment." One of Hoffman's resolutions provided: "I will never enter into any conversation with my opponent's client, relative to his claim or defense, except with the consent, and in the presence of his counsel."

In the old ABA Canons of Professional Ethics, written nearly a century ago (1908), Canon 9 provided as follows:

#### **Negotiations with Opposite Party**

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.... [Emphasis added.]

The question soon arose whether the term "party" was to be read literally, meaning only a party to pending litigation, or whether it had a more expansive meaning. The question was settled in N.Y. City 101 (1928). There, the committee stated that under Canon 9 an attorney investigating the facts of a demand for money damages may not interview an opposing party who is represented by counsel, without that counsel's consent, even though suit has not yet been filed. That conclusion was soon echoed in N.Y. City 302 (1934), where the committee chastised an in-house lawyer at a taxicab company for negotiating a settlement with an injured person represented by counsel before the injured person filed suit.

The committee stated that a lawyer "should not negotiate or compromise a matter with the opposite party represented by counsel, but should deal only with the counsel," whether or not suit has been filed.

When New York first adopted its version of the ABA Model Code of Professional Responsibility in 1970, DR 7-104(A)(1) provided as follows:

### Communicating With One of Adverse Interest

A. During the course of his representation of a client a lawyer shall not:

1. 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. [Emphasis added.]

However, the related Ethical Consideration, EC 7-18, provided in relevant part as follows:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of the client with a *person* the lawyer knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless the lawyer has the consent of the lawyer for that person....

The Second Circuit attempted to resolve the schism between "person" and "party" in *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir.1995). Defense attorney Robert Simels represented Brooks Davis, a defendant in a drug conspiracy trial. As part of his investigation, Simels contacted a man named Aaron Harper, whom Simels knew to be represented by counsel in a separate but related proceeding. (Harper's case involved the attempted murder of a government witness in Davis's drug conspiracy trial.) The Southern District Grievance Committee censured Simels for violating DR 7-104(A)(1), but Simels appealed the censure. It was undisputed that Harper was represented by his own counsel and that Simels knew he was represented. The key question was whether Davis and Harper were "parties" in the same "matter" such that Simels needed consent from Harper's attorney before talking to Harper. The Second Circuit reversed, saying:

... Although it may well be that DR 7-104(A)(1) can reasonably be read, as the Committee did, to find that the word "party" is broad enough to encompass the relationship between Davis and Harper, as we view the issues, a narrow interpretation of the Rule is the wiser course for the federal courts to follow.... In interviewing Harper, Simels was interviewing a potential witness in the drug conspiracy case and a potential codefendant of his client in a related but distinct matter, the attempted murder of Diggins. In neither case was Harper a "party" in the same "matter."

The court then reviewed the purposes of the no contact rule: (1) it protects a defendant from "the danger of being tricked into giving his case away by opposing counsel's artfully crafted questions"; (2) it protects represented clients from "disclosing privileged information or from being subject to unjust pressures"; (3) it helps "settle disputes by channeling them through dispassionate experts"; (4) it rescues lawyers from "a painful conflict between their duty to advance their clients' interests and their duty not to overreach an unprotected opposing party"; and (5) it provides parties with "the rule that most would choose to follow anyway." In light of these purposes and the "realities" of criminal practice, the court determined that DR 7-104(A)(1) "should be construed narrowly in the interests of providing fair notice to those affected by the Rule and ensuring vigorous advocacy not only by defense counsel, but by prosecutors as well."

Construing the word "party" to include a person represented by counsel in a distinct and separate matter "threatens to inhibit defense attorneys' efforts to interview witnesses and develop trial strategies."

Furthermore:

[A]s a matter of policy, the broad and ambiguous interpretation of "party" employed by the Committee threatens to chill all sorts of investigation essential to a defense attorney's preparation for trial. Taken to its extreme, the Committee's interpretation of 'party' might well bar defense counsel from contacting represented co-targets during the investigative phase of a large conspiracy.

However, the court acknowledged that its rule might permit an attorney for one person to "procure an uncounseled statement from a witness or potential codefendant that could jeopardize that person's cooperation agreement and be used against him or her at trial." But that was a policy choice between the rights of one defendant and the rights of another defendant, and that policy choice should not be made through "expansive interpretations of disciplinary rules."

Thus, the *Simels* case had decided that the term "party" in DR 7-104(A)(1) was not broad enough to encompass a person known to be represented by counsel in a separate "matter." Against that backdrop, the New York State Bar Association's Special Committee to Review the Code of Professional Responsibility (known as the "Krane Committee," after its Chair, Steven Krane of Proskauer Rose in NYC) studied DR 7-104 as part of its comprehensive review of the Code.

The Krane Committee recommended that the word "party" in DR 7-104 be changed to "person." Thus, the proposed version of DR 7-104(A)(1) prohibited a lawyer in the course of representing a client from communicating on the subject of the representation with a "person" the lawyer knows to be represented by a lawyer in that matter unless the lawyer had the prior consent of the lawyer representing the other "person" or was authorized by law to do so.

In its "Explanation of Change," the Krane Committee explained the proposed change from "party" to "person" as follows:

Clarifying rule by eliminating the reference to "party" in DR 7-104(A)(1) which ... has given rise to the incorrect arguments that the anti-communication rule (i) applies only in matters that are actively being litigated and (ii) even in litigated matters does not apply to non-party witnesses.

In March 1997, after extensive debate, the New York State Bar Association House of Delegates forwarded the Krane Committee's recommendations to the New York Appellate Divisions, which promulgate the Disciplinary Rules in the New York Code of Professional Responsibility.

### **The 1999 Amendments to DR 7-104(A)(1)**

The Appellate Divisions bought the Krane Committee's recommendation - or so it seemed at first. In the wholesale amendments promulgated on June 30, 1999, the courts changed the word "party" to "person" in DR 7-104(A)(1). But then a strange thing happened. A few months after promulgating the amended rules, the courts, acting *sua sponte*, un-amended DR 7-104(A)(1), changing the new word "person" back to the old word "party." The courts said that the change from "party" to "person" had been a clerical mistake, but rumors abound that prosecutors urged the judges to undo the change and reinstate the word "party" in DR 7-104(A)(1). Whatever the reason, the courts reissued DR 7-104, changing "person" back to "party."

In N.Y. State 735 (2001), however, the New York State Bar ethics committee made clear that the ultimate retention of the word "party" would have little effect. The purpose of DR 7-104(A)(1), the committee said,

was "to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches." Outside the criminal context, therefore, the Committee had uniformly interpreted the rule to apply to any person or entity represented in a matter. Thus, the committee said:

[T]he rule applies to a represented party to a transaction as well as a party to a lawsuit; it applies to one who retains counsel in connection with a dispute even prior to the filing of a lawsuit; and during a civil lawsuit it applies to represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties to the lawsuit.

When the Appellate Divisions decided in 1999 to retain the term "party" instead of changing it to "person," we do not think they intended to cut back on this "long standing, universal understanding" about the scope of DR 7-104(A)(1) in *non-criminal* cases. [Emphasis added.]

But N.Y. State 735 did not address the scope of the word "party" in criminal cases. To analyze that question, I turn now to the Kabir and Quiroz decisions, both of which were decided within the last eight months.

### **Kabir: Is a Represented Witness a "Party"?**

In *People v. Kabir*, the People alleged that Kabir, a pharmacist, had submitted forged claims for prescription refills for various Medicaid recipients. A lawyer named Scott Tulman continuously represented an unidentified woman referred to as "W1" in connection with the *Kabir* matter, and he informed Special Assistant AG Robert Goldstein of the NYAG's Medicaid Fraud Control Unit, who is in charge of this prosecution, that W1 "did not want to cooperate with his investigation and did not want to appear as a witness either in the grand jury, or at any trial of this matter." Nevertheless, Goldstein granted transactional immunity to W1 and subpoenaed her to testify before the grand jury, at which she was represented by Tulman. The grand jury indicted Kabir.

In August 2006, shortly before trial, an investigator for the Medicaid Fraud Control Unit appeared where W1 worked and informed her that Goldstein, who had met with W1 before questioning her at the grand jury, wanted to meet with her again. The investigator told W1 to call Goldstein that day to set up a meeting with him. W1 called as requested and agreed to meet with Goldstein at his office two days later.

I was concerned about reviewing documents without my attorney being present and said "Should I call my lawyer. Am I in trouble?" One of the people in the room said "Do you still have a lawyer?" and I said "I do." Someone then said "You can if you want, but you don't have to because you don't need a lawyer." The gentleman explained to me that a lawyer was no longer necessary because I already had immunity and I was not in trouble.

W1 met with Goldstein for about two hours. Goldstein asked her to review her grand jury testimony for accuracy and to review some prescriptions to identify the handwriting. W1 apparently identified the handwriting as Kabir's, which was damning testimony against Kabir on the forgery charges. W1 did not attempt to contact her lawyer (Tulman) at any time between her meeting with Goldstein's investigator on August and her meeting with Goldstein on August 30th. The Attorney General's Office made no attempt to contact Tulman at any time, but Tulman soon found out about Goldstein's ex parte communication with his client and informed Kabir's counsel. Kabir, in turn, moved to disqualify Goldstein, and to

suppress any testimony by W1 that was inconsistent with her grand jury testimony, on grounds that Goldstein had violated DR 7-104(A)(1).

Judge Barbara Newman held oral argument on the motion. The argument got nasty. Roger Stavis, counsel for defendant Kabir, argued that Goldstein had violated DR 7-104(A)(1) by communicating with a "person" he knew to be represented by a lawyer without that lawyer's consent. The violation of DR 7-104(A)(1) violated Kabir's due process rights. Goldstein was "out to get Mr. Kabir," Stavis argued, "and he wasn't going to let the law stand in his way. He was going to cheat and he was gonna do whatever he needed to do to get Mr. Kabir."

Goldstein responded by citing Simels, noting that W1 "is not now nor has she ever been a party to this proceeding." Goldstein then handed the court a page from SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED recounting the flip-flop-flip from "party" to "person" and back to "party" in 1999. "So, that's what happened," Goldstein said, "and the Court changed the rule back so that the word it was, person, then it became party for a short period of time, but then it was changed back to person. That's the way it was, which is party, which is the way it is now and has been."

In its written opinion, the court denied the defense motion in all respects, finding that Goldstein's actions did not violate DR 7-104(A)(1). The court explained its opinion as follows:

Unlike the constitutional rights to counsel and against self-incrimination, DR 7-104(a)(1) does not include among its ancillary effects a shield against unwelcome communications from a defense attorney or prosecutor concerning a criminal proceeding as to which one is merely a witness. Rather, "DR 7-104(A)(1), both in origin and in scope, is primarily a rule of professional courtesy." ... In the context of criminal prosecutions, an additional "purpose of DR 7-104(A)(1) is to protect a defendant from the danger of being 'tricked' into giving his case away by opposing counsel's artfully crafted questions." But the Rule does not extend the same protection to one who is neither a defendant nor has any other personal justiciable stake i.e., the possibility of being found guilty of and/or punished for the commission of a criminal act in the outcome of the criminal proceeding which is the subject of the attorney's inquiry. [Citations omitted.]

Thus, *Kabir* put a state court stamp of approval on the holding in Simels.

### ***Quiroz: Contacting a Law Guardian's Client***

*People v. Quiroz* provides a wonderful complement to *Kabir* because in *Quiroz* the shoe was on the other foot - defense counsel had communicated with a prosecution witness who was represented by counsel, and the People moved to disqualify defense counsel on grounds that he had violated DR 7-104(A)(1).

The People in *Quiroz* accused the defendant, Rafael Quiroz, of sexual abuse in the second degree for engaging in inappropriate sexual activities with his niece, a mentally retarded 16 year old girl. Quiroz hired well-known defense attorney Thomas Liotti to defend him.

Three months after the People commenced the criminal action against Quiroz, the Nassau County Department of Social Services filed a neglect proceeding in the Nassau County Family Court against defendant's sister (the victim's mother) based on the same events that gave rise to the criminal case. The

County also commenced a derivative proceeding against defendant Quiroz, who hired Liotti's firm to represent him in Family Court as well. The victim's mother also had counsel, and the Family Court appointed a law guardian (Steven Herman) to represent the alleged victim ("the child" in Family Court parlance).

In October 2006, Liotti wrote a letter to Nassau County District Attorney Kathleen Rice urging that the criminal charges against defendant Quiroz be dismissed. To support that request, he enclosed two affidavits, one by the alleged victim and the other by the victim's mother. Both affidavits had been sworn to before defense counsel, who is also a notary. In her affidavit, the alleged victim recanted her accusation. The mother's affidavit explained that the alleged sexual abuse could not have occurred because she was with her daughter in their shared bedroom at the time the acts are alleged to have taken place.

At the time he communicated with the victim and her mother, Liotti had not obtained consent from counsel for either the victim's law guardian or counsel for her mother, even though both the victim and her mother were parties to the Family Court action. The law guardian, arguing that Liotti had violated DR7-104, asked the Family Court (a) to disqualify Liotti from representing Quiroz in the Family Court and (b) to preclude Quiroz from using the victim's statement in the Family Court proceedings. The Family Court granted both prongs of the motion, ruling that defense counsel had violated the child's due process rights.

The People then moved for virtually identical relief in the criminal action - disqualifying Liotti as defense counsel and suppressing the affidavits he had obtained from the victim and her mother. The People argued that Liotti's communication with the victim and her mother when both were represented by counsel was "an egregious violation of the Code of Professional Responsibility." But, aware of Simels and Kabir, the People emphasized that their disqualification motion was "based on [defense counsel's] improper communications given the Family Court representation of the parties, and not on his having spoken with witnesses in a criminal case such as this."

Defense counsel (Liotti) responded that DR 7-104 did not apply because neither the alleged victim nor her mother was a "party" to the criminal action. He also argued that because his associates - not he - had appeared in Family Court, he personally was "not aware" that the alleged victim and her mother had counsel in the Family Court matter. He also asserted that both the victim and her mother had come to his office twice, "unsolicited and voluntarily"; that they were informed that Liotti represented the defendant and did not represent them or their interests; that the first time they came to his office he had "declined to take statements from them" and had "recommended that they confer with family members, advisors, and counsel, if any, before providing these statements" and that they had returned and given statements to his associate, who had also "cautioned them regarding a recantation or change in their statements."

The court began by noting that the right to counsel of one's own choosing in a criminal case is "a fundamental constitutional right that is not to be interfered with unless some competing matter of public policy so dictates." The court also noted that "while the courts are always concerned with the integrity of the judicial system and the preservation of ethical standards, the disciplining of attorneys who engage in misconduct is not of direct concern" when ruling on motions to disqualify counsel. The court then concluded that "the differences between the Family Court proceeding and this criminal action warrant a difference in the outcome of the motion before me."

The court was "unpersuaded by defense counsel's assertions that he did not know that the alleged victim and her mother were represented by counsel." Given Liotti's experience, he "certainly should have known of the representation, and neither he nor his associates should have communicated, either with the alleged victim, or her mother, without the consent of their respective attorneys." But the People had pointed to no conduct on the part of Liotti in the context of the criminal case that warranted interfering with defendant's fundamental constitutional right to counsel of his own choosing. Indeed, the court said, it appeared that the People "seek to have defense counsel punished here because of factors pertinent to the Family Court proceeding." But the considerations underpinning the Family Court's decision to grant the disqualification motion in that court simply did not pertain in the criminal case. "Neither the alleged victim nor her mother is a 'a party' to the criminal action," the court said, "and I am aware of no public policy or other consideration pertinent to this action that warrants interfering with Defendant's fundamental, albeit not absolute, right to counsel of his own choosing. The court therefore denied the motion to disqualify defense counsel based on his violation of DR 7-104 in the Family Court proceeding. The court also declined to preclude use at trial of the statements defense counsel had obtained from the alleged victim and her mother. "Apart from the fact that such a spector [sic] implicates the constitutional right to confront the People's witnesses with prior inconsistent statements," the court said, "in New York, exclusion of a statement is not an appropriate remedy for the misconduct about which the People complain."

### **Not Every Represented "Person" is a "Party"**

The lesson to be drawn from *People v. Kabir* and *People v. Quiroz* is simple: in criminal cases, not every person represented is a "party" within the meaning of DR 7-104(A)(1). Therefore, a lawyer in a criminal case who communicates with a non-party witness represented by counsel is not violating the no-contact rule. This outcome, which merely imports the Simels holding into the state courts, means that in criminal matters prosecutors and defense counsel alike are free to communicate with (and to obtain statements from) represented witnesses without the consent of their counsel - indeed, even over the express objections of their counsel. As long as a witness is not a named party to the criminal matter, the witness is not considered a "party" within the meaning of DR 7-104(A)(1), even if the witness is a party to some other proceeding.

If a lawyer is retained to represent a witness in a criminal case and does not want the prosecutor or defense counsel to talk to his client without his prior consent, therefore, the lawyer must impress on his client that the client is not obligated to - and should not - talk with the prosecutor or defense counsel without first calling the lawyer. A lawyer who fails to warn his client about the dangers of failing to consult her lawyer before talking with the prosecutor or defense counsel is leaving the client wide open for exploitation by advocates for parties whose interests may differ sharply from the interests of the witness.

None of this is likely to change even if the courts adopt the proposals by the New York State Bar Association Committee on Standards of Attorney Conduct ("COSAC"). COSAC's proposed Rule 4.2 would change "party" to "person" to bring it into line with ABA Model Rule 4.2. But the Reporter's Notes to the proposed rule states: "The use of the term 'represented person' rather than 'represented party' is not intended to effect any change in the scope of the anti-contact rule in criminal litigation, which has, in any event, been left to case law." We can now add *Kabir* and *Quiroz* to that body of case law, which seems

unlikely to reverse course anytime soon.

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