

**KINGS COUNTY
CRIMINAL BAR ASSOCIATION**

**ETHICAL ISSUES
IN CRIMINAL CASES:
“THE NO-CONTACT RULE”**

NOVEMBER 27, 2007

SITUATION ONE

- You represent the seller in a real estate transaction and you *know* that the buyer's attorney has not advised the buyer of your latest offer.
 - What can you do?
 - D.R. 7-104(A) is the New York “represented party” rule.
 - The Rule prohibits contact absent consent by the attorney representing the party or unless authorized by law. And there is no “good purpose” exception.
- What if there is no litigation? Is the represented “person” a represented “party”?

SITUATION TWO

- **In the same real estate situation, you consider circumventing D.R. 7-104(A) by having your client, the seller, talk to the buyer about the offer his lawyer has concealed from him. Is that an option?**
 - **D.R. 1-102(A)(2) prohibits a lawyer from circumventing a Rule through the actions of another.**
- **What about a “soft suggestion” to your client that “I can’t speak to the buyer, but you can.”**

SITUATION TWO (CONT.)

- **D.R. 7-104(B) provides that unless prohibited by law, a lawyer may cause a client to communicate with a represented party, and counsel the client with respect to those communications if the lawyer gives reasonable advance notice to the represented party's counsel.**
- **Proposed COSAC Rule 4.2(b)(2) permits the lawyer to advise his or her client about communicating with a represented party directly and *omits* the current Rule's notice to counsel provision.**

SITUATION THREE

- In a litigated case involving a commercial dispute, you would like to interview a key witness to the transaction. The witness has a lawyer who has written you a letter directing you not to communicate with the witness. What can you do?
- In this situation, is the represented “person” a “party” for purposes of the Rule?
 - No says cases such as People v. Kabir, 13 Misc.3d 920 (S.Ct. Bnx. Co. 2006)(collecting authority).
 - Yes says bar opinions such as N.Y. State Bar Op. 735 (2001); and some writers have said that the Kabir-type interpretation is limited to criminal cases. See COSAC proposed Rule 4.2 (a) (with language of “represented person”).

SITUATION FOUR

- You are suing a bank and you would like to interview a mid-level employee who is a potential witness but who is not a named party. Can you?
 - You would need to apply the analysis of Niesig v. Team I, 76 N.Y.2d 363 (1990), to determine if the employee's statements are binding on the entity (i.e., alter ego approach); or whose acts or omissions are imputed to the entity for purposes of liability; or if the employee implements the advice of counsel.
- What if it is a *former* employee? Does that change your analysis?
 - Again, Niesig provides guidance and allows interviews of former employees.

SITUATION FOUR (CONT.)

- **Can the bank's lawyer announce to you (and the world) that he or she represents all of the bank's employees; and, if so, are you bound by that statement?**
- **What if you know that the bank and the employee have fundamentally adverse interests and the lawyer for the bank would likely be ethically prohibited from representing the employee?**

SITUATION FOUR (CONT.)

- What if the employee retains his own counsel but the bank's lawyer has not retracted his broad announcement that he or she represents all of the employees?
- Could you interview a former employee who had familiarity with the transaction that gave rise to the lawsuit; who had familiarity with the lawsuit; and familiarity with legal strategies or communications with the company's counsel?
 - See Siebert v. Intuit, Inc., 32 A.D.2d 284 (1st Dept. 2006). (Interview proper but counsel should make it clear that the former employee should not disclose privileged information.)

SITUATION FIVE

- Assume that you are sending private investigators into the field to conduct interviews of witnesses? Are there any particular concerns you should have?
- Consider Matter of Friedman, 196 A.D.2d 280 (1st Dept. 2004) (attorney may be deemed to have knowledge of activities of private investigator). Thus, private investigators must be advised of reach of D.R. 7-104(A).
- In fact, in Allen v. Intl. Truck, 2006 WL 2578896 (S.D. Ind. Sept. 6, 2006), the court held that an attorney knew or should have known of his investigator's improper contact with represented witnesses due to billing documents which had been submitted to the attorney.

SITUATION SIX

- **What would you do if you were involved in a civil case pending in New Jersey Federal Court, and you wanted to contact the represented witness in the State of New York?**
 - **Apply the applicable “choice of law” rules which apply. See D.R. 1-105.**

EASY-TO-ACCESS SOURCES FOR ETHICS RESEARCH

- Simon's New York Code of Professional Responsibility Annotated 2006 (1,600 page soft-cover yearly publication).
- OceanaLaw on-line research (searching all N.Y. State ethics opinions).
- Annotations to McKinney's New York Judiciary Law section 90.
- ABA/BNA Lawyer's Manual on Professional Responsibility.
- Restatement of the Law Governing Lawyer's (Third).