

# Professional Responsibility Report

The Newsletter for New York Lawyers on Ethics & Professionalism

July 2008

## Ethics Research Made Easy, Or, at Least, Easier

BY JEREMY R. FEINBERG

For all of the scholarly and practical literature written about ethics issues, there is relatively little guidance on how best to research questions of ethics and professional responsibility. The goal of this article is to provide the reader with some landmarks and navigational tools for ethics research, and hopefully save numerous hours in the library or in front of a computer screen looking for the key authority.

NYPRR ran two articles on the subject over five years ago, in which Dean Mary Daly addressed both New York sources (Researching Ethics Issues – A List of Sources, NYPRR, March 2003), and non-New York sources (Researching Ethics Issues – A List of General Sources, NYPRR, May 2003). But given the passage of time, and with the recognition that there is more than one way to solve an ethics problem, I propose to revisit, and update, guidance on how to research New York ethics issues. Internet resources have grown exponentially in the time since NYPRR last examined the topic, and so I will spend some time addressing a few new computer-based materials as well. I will not address the research tool you already have in your hands, or on your computer screen – NYPRR.

### Two Basic Research Principles

Researching ethics is, by its nature, different from traditional legal research. First, one cannot expect to simply jump onto a standard computer-assisted legal research service such as LEXIS or Westlaw, type in a few search terms, and have an answer within a few moments. A seasoned researcher looking for key cases under the CPLR, for example, may be able to find an answer this way. The likely result of a similar approach for an ethics question would be either no hits or far too many hits to sift through in a reasonable time, depending on the question.

The reason for this is simple: the courts do not typically reach most issues of legal ethics or professional responsibility in their reported decisions. There are, of course, many decisions defining the scope of the attorney-client privilege, plenty of opinions examining motions to disqualify a lawyer or law firm, and, recently, more and more cases addressing the inad-

## 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.

### Early Evolution

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

vertent disclosure of confidential materials. On the one hand, running an online search for any of these central issues is likely to generate too many results. On the other hand, searching in the case law for other disciplinary rules, or for ethics issues generally is likely to turn up very little – and then, most likely, only a few appeals to the Appellate Divisions from disciplinary determinations. These may or may not provide analysis relevant to your issue.

Another general principle that underlies ethics research is that you should not face any issue alone, even if it may seem a solitary enterprise as you research it. Very often, you will not find a definitive answer to your problem. Whether you look at case law, ethics opinions, treatise entries, or some combination of all of these, there is usually more than one answer (or even several conflicting answers) to a question. Although frustrating, perhaps, this ambiguity compels a decision informed by your tolerance for risk. Here, remembering that you're "not in this alone" is important. Make sure, within the limits of the attorney-client privilege, to involve other people in your research. In other words, spread the tolerance for risk among others whose judgment you trust, particularly if discipline could follow from a given choice. Engaging in this type of discussion, especially with the office's ethics specialist or committee (again, within the privilege) diversifies the judgments involved, and can often lead to a better answer. If you do not have a fellow practitioner to consult, some bar associations have "ethics helplines" through which callers can get informal guidance from attorneys knowledgeable about ethics issues. The New York City Bar Association helpline (212-382-6624) is one example.

### Materials To Consult In Researching Ethics Issues

Where to begin your research is usually an easy question. For most ethics issues, starting with the applicable rules, and, if appropriate, with the statutory authority, is the right way to go. The New York Code of Professional Responsibility (Code) can be found online in several places, including the New York State Bar Association website. Visit [www.nysba.org](http://www.nysba.org) and then click on "For Attorneys" and then on "Professional Standards for Attorneys." Although the Disciplinary Rules (DRs) and Ethical Considerations (ECs) in the Code are vital guideposts for an ethics question, they are not the only relevant rules for a lawyer. Depending on which Department of the Appellate Division the lawyer was admitted in, there are additional rules governing lawyer conduct that may cover more specific issues than the Code itself does. See, e.g., 22 NYCRR 603 (Rules of the Appellate Division, First Department on the Conduct of Attorneys); 22 NYCRR 806 (Third Department Rules); 22 NYCRR 1022 (Fourth Department Rules). These rules can also be found at the NYSBA website above.

Statutes are also potentially relevant to ethics research – most notably the Judiciary Law. Although most practitioners know

to consult the CPLR annotations and practice commentaries to expand their knowledge of the attorney-client privilege, they may not know that they should examine Section 475 of the Judiciary Law if they have a question about when, and under what circumstances, they can invoke an "attorney's lien" against a non-paying client. Similarly, if they are looking for guidance on the use of IOLA accounts for their escrow funds, they may (or may not) know to consult Section 497 of the Judiciary Law.

### For Interpretative Authority, Start With Treatises

Once you have identified the Code provisions, rules or statutes relevant to your inquiry the next task is to find interpretative authority. For that, I would first recommend going to one of three treatises. I don't mean to suggest that there aren't other good learned volumes to consider – in fact Dean Daly's two-part article identified a number of them – these are just the first three that I have learned to go to when I have a generic ethics issue to research.

Professor Roy Simon's *Simon's New York Code of Professional Responsibility Annotated* (Thompson-West 2007) (Simon's) is viewed by many as the definitive authority on New York ethics issues. The text is organized around the DRs, with pages of annotations to case law, ethics opinions, and secondary sources. Professor Simon also adds his own commentary to certain portions of the text. If you don't happen to know which DR applies to the question you have, a detailed word index will point you to whichever section(s) of the Code may be relevant. This treatise is updated yearly, so if it has one shortcoming, it is that very recent authority will not appear until Professor Simon's next edition. On the other hand, the treatise does have a section that reprints the full text of ethics materials issued immediately prior to the date of publication.

If you need to research ethics issues in other jurisdictions – or, in more than one jurisdiction – or if the Simon treatise is off the library shelf, my own experience has shown that the ABA/BNA Lawyers' Manual on Professional Conduct is an excellent choice. The Manual is a multi-volume loose-leaf service, which is now also available on Westlaw in the database entitled ABA-BNA-MOPCNL and on LEXIS under "Secondary Legal" and the database for "BNA." Among other things, the Manual collects ethics cases and materials from around the country, broken up by subject matter. If, for example, New York has not yet reached a particular issue, going to the Manual is a great way to see what other U.S. jurisdictions have said. If you're ever faced with a 50-state survey assignment, comparing how different courts have treated a specific ethics issue, run, don't walk, to the Manual. It will save you countless hours, because its editors have done the collecting for you. Another excellent feature of the Manual is that it is frequently updated – presenting recent opinions from

bar associations, court decisions, and even news updates on conferences and legislative developments. Think of it as the equivalent of “advance sheets” for ethics information.

A third treatise you should consider studying is the Restatement (Third) of the Law Governing Lawyers. Prepared by the American Law Institute in the traditional Restatement format, this treatise has illustrations, examples, and annotations to case law and ethics committee opinions from around the country. Perhaps the best evidence of the Restatement’s usefulness, however, lies in the fact that it is commonly cited by appellate courts analyzing ethics issues. Suffice to say, if the appellate courts are citing to this treatise, shouldn’t you?

### Bar Association Ethics Committee Opinions Are Useful Too

I have made reference to ethics committee opinions several times in this article. Many major bar associations have ethics committees, some of which issue formal opinions to help guide practitioners and courts as to what the law of ethics is. If court decisions haven’t reached an ethics issue, there is a reasonable likelihood that one or more bar association committees have opined on it. Some of the more well known and prolific ethics committees within New York State are the New York State Bar Association ([www.nysba.org](http://www.nysba.org) then click “Publications” and “Ethics Opinions”); the New York City Bar Association ([http://www.nycbar.org/Publications/reports/reports\\_ethics.php](http://www.nycbar.org/Publications/reports/reports_ethics.php) [last visited June 8, 2008]); the New York County Lawyer’s Association ([http://www.nycla.org/index.cfm?section=News\\_AND\\_Publications&page=Ethics\\_Opinions](http://www.nycla.org/index.cfm?section=News_AND_Publications&page=Ethics_Opinions) [last visited June 8, 2008]); and the Nassau County Bar Association ([http://www.nassaubar.org/ethic\\_opinions.cfm](http://www.nassaubar.org/ethic_opinions.cfm) [last visited June 8, 2008]). The American Bar Association’s Ethics Committee, although not limited to New York State issues, is well known and well respected ([www.abanet.org](http://www.abanet.org) then click “Lawyer Resources; EthicSearch; Lawyer Ethics and Professionalism; ABA ethics opinions”).

*[Editor’s note: the ethics opinions cited above can also be accessed on the NYPRR home page, [www.nypr.com](http://www.nypr.com). Just click on the appropriate logo and go directly to the opinions of the Association whose logo you’ve clicked on.]*

Ethics opinions come with significant positives and negatives of which the prudent researcher should be aware. The opinions constitute a combination of ethical and practical advice intended to guide practitioners as to the boundaries of permissible conduct. A practitioner who analyzes his dilemma by following the teachings of a well-reasoned opinion from a respected bar association, will typically be better off in a disciplinary action than a practitioner who did not do so.

These opinions are prepared after analysis of an issue by volunteer ethicists, frequently including lawyers, judges, and profes-

sors who have devoted themselves to studying legal ethics. These committee members have reviewed the issue(s) thoroughly, and they normally set forth their conclusions in a relatively simple format. From the standpoint of further research, ethics opinions can be a “gold mine.” The opinions may provide citations to other relevant resources, including rules, case law, and even other bar association ethics opinions on the same issue.

On the other hand, these opinions do not have the force of law and are not binding – not on courts, not on other ethics committees, and not even on the lawyers who read and write them. Very often, bar association ethics committees disagree with each other on the proper analysis of an issue. One recent example concerned the duty of a lawyer who receives an inadvertent disclosure of privileged information (compare NYCBar Op. 2003-04 with NYCLA Op. 730 with ABA Opn. 05-437). There is no hierarchy among these opinions, either. A national ethics opinion, like the ABA, does not trump a local one. Nor would a state-wide opinion carry more weight than one from a city bar committee. Even if two committees have the same view of an issue, and a third committee differs, that does not mean that either is “right” or “wrong.” Committees also have been known to revisit their own opinions. This makes it a good idea for a researcher to check that subsequent committee opinions from the same bar association have not overruled or modified a prior conclusion. See, e.g., NYCBar Op. 2003-02 (modifying earlier opinions 95-10 and 80-95 concerning undisclosed taping of conversations).

### General Legal Ethics Websites

Internet websites covering legal ethics have long been a presence, and a useful resource for those researching ethics. Two websites that stand out are the American Legal Ethics Library at Cornell Law School (<http://www.law.cornell.edu/ethics> [last visited June 9, 2008 and also accessible on NYPRR’s home page]) and the ABA’s Center for Professional Responsibility ([www.abanet.org/cpr/](http://www.abanet.org/cpr/) [last visited June 9, 2008]). The former is a partial collection of rules, commentary and opinions from many states. Its New York section contains a cross-linked version of the Code, commentary comparing each provision to its counterpart(s) in the Model Rules, and a handful of other related resources. The latter website, which requires an ABA membership to make full use of some of its resources, provides a running collection of ethics news stories, the ABA’s ethics opinion database, and a detailed list of ethics resources throughout the country.

Another website, devoted exclusively to the issue of conflicts of interest, is <http://www.freivogelonconflicts.com/> (last visited June 10, 2008). The website bills itself as a “guide to conflicts of interest for lawyers,” and subdivides itself into many different categories that are relevant to common day-to-

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day conflicts questions. It also provides a comprehensive collection of cases that fall directly under each conflicts category.

### Legal Ethics Blogs

Given the widespread use of Internet blogs on other issues, it should not be surprising that ethics issues are treated in the “blogosphere” as well. Typically, the more useful blogs will focus on a specific area, rather than attempt to keep up with ethics generally. With the important caveat that blogs come and go quickly, I offer three that, as of this writing, contain useful information for an ethics researcher. First, the Legal Ethics Forum is a blog run by a group of ethics professors from around the country, reporting information from mainstream news sources, conferences, and the like. It also contains a list of links to other blogs, websites, and resources. <http://legalethicsforum.typepad.com/blog/> (last visited June 8, 2008).

As one might expect, [www.legalethics.com](http://www.legalethics.com) (last visited June 8, 2008) is a relevant site to visit, but rather than covering a wide range of topics, it is in fact a blog with a more limited focus – ethics issues arising from the use of technology. If you would like to see how issues of inadvertent disclosure through misuse of e-mail or metadata are playing out around the country, this is a useful resource.

A third blog worthy of mention is [www.electronicdiscovery-blog.com](http://www.electronicdiscovery-blog.com) (last visited June 8, 2008) which is a site collecting and presenting case law and other resources from around the United States focused on electronic discovery issues. Given the explosive growth of e-discovery in the past few years, it is likely that blogs such as this one could become an invaluable time-saver in locating the most recent, or most important, decisions in this nettlesome area of litigation.

### Judicial Ethics Research and Resources

If you need to find an answer to a judicial ethics question, new resources now exist for this class of questions as well. New York State’s Advisory Committee on Judicial Ethics has recently launched a full website, complete with a library of commonly referenced materials, links to the websites of other relevant judicial ethics websites, and, most importantly, a full-searchable database of the Committee’s thousands of prior opinions. This website can be found at <http://www.nycourts.gov/ip/acje/index.shtml> (last visited June 7, 2008) and the searchable database by selecting “search ethics opinions” from that page. If, for example, a reader of NYPRR wishes to look more closely at an issue raised in the Committee opinion running in this month’s issue, typing “08-71” into the searchable database will bring up the opinion and any other subsequent opinions citing to it.

The New York State Commission on Judicial Conduct also has its own website, with a searchable database of its public disci-

plinary determinations. Those decisions, which can be found at [http://www.scjc.state.ny.us/Determinations/all\\_decisions.htm](http://www.scjc.state.ny.us/Determinations/all_decisions.htm) (last visited June 10, 2008), establish the outer bounds of behavior for which judges can be disciplined. By contrast, the Advisory Committee on Judicial Ethics opinions set forth safe harbors for permissible behavior by judges.

### Don’t Overlook Search Engines

Finally, sometimes the most basic and commonly used Internet research tools may prove to be quite useful in relation to their cost. Typing a search into your favorite search engine, whether [www.yahoo.com](http://www.yahoo.com), [www.google.com](http://www.google.com), or something else, can lead to commentary, articles on law firm websites, or other materials that would not otherwise be uncovered through any other search method. Just bear in mind, that these search results may not all be equally reliable, nor may they cover the topic you need to research in sufficient depth to be helpful.

### Conclusion

I have tried to give you a sense of where you can look, and what you should look for, in researching New York ethics issues. Ethics practitioners and regular readers of NYPRR already know that as of this writing, the Appellate Divisions are considering a proposal from the New York State Bar Association. This proposal would shift the format of New York’s ethical guidelines from the format of a Model Code jurisdiction (it is the last such jurisdiction) to the format of a Model Rules jurisdiction. It would also update the substance of the Code to reflect both modern practice and the conclusions of courts and ethics committees that have interpreted the Code over the years. Be assured that if such a significant change occurs, many of the resources I have cited above will be first among the sources you should consult for interpretative assistance. ■

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

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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

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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) governmental 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 opposed 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.

*continued on next page*

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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[From time to time, NYPRR will publish an Opinion of the Advisory Committee on Judicial Ethics. The Opinions published are those selected by Justice George D. Marlow, Committee Chair, and Jeremy R. Feinberg, who serves among the Committee's Counsel. Permission to reprint the Opinion below was requested by NYPRR because of its significance to New York lawyers who appear before the Courts.]

## Opinions from the Advisory Committee on Judicial Ethics

The Advisory Committee on Judicial Ethics ([www.nycourts.gov/ip/acje](http://www.nycourts.gov/ip/acje)) responds to written inquiries from New York State's full- and part-time judges, candidates for elective judicial office, and quasi-judicial officials such as support magistrates, court attorney-referees, and judicial hearing officers. The committee's opinions interpret the Rules Governing Judicial Conduct (22 NYCRR Part 100), the Code of Judicial Conduct and Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36). Justice George D. Marlow chairs the committee of 26 judges, and Maryrita Dobielski, Esq. is its Chief Counsel.

### Opinion 08-71

April 24, 2008

**Digest:** (1) A judge whose law clerk was formerly a non-supervisory staff attorney for a Legal Aid organization may preside over criminal cases in which a defendant is currently represented by Legal Aid, but should insulate the law clerk and disclose the prior employment when the law clerk was personally involved in the case. Upon application for recusal, the judge should exercise discretion in light of the facts presented. (2) During the interim period after the judge has hired a Legal Aid staff attorney as his/her law clerk but the attorney has not yet formally commenced the new employment, the judge may continue to preside over cases that have been re-assigned to other Legal Aid staff attorneys, subject to full disclosure to all parties. Upon application for recusal, the judge should exercise discretion in light of the facts presented. (3) During this interim period, the judge is disqualified from presiding over any matters in which his/her new hire appears, subject to remittal if the judge believes he/she can be fair and impartial.

**Rule:** 22 NYCRR 100.2; 100.2(A); 100.3(E)(1); 100.3(F); Joint Opinion 07-105/07-119; Opinions 07-04; 00-66 (Vol. XIX); 99-91 (Vol. XVIII); 97-59 (Vol. XV); 93-132 (Vol. XI).

**Opinion:**

A criminal court judge recently has hired an attorney to work as his/her law clerk, whose employment with the judge will begin in six weeks. The future law clerk currently is employed as a non-supervisory staff attorney with a Legal Aid organization and regularly appears before the judge in that capacity. The future law clerk plans to transfer his/her cases that currently are pending in the judge's part to other Legal Aid attorneys. The judge asks if he/she must insulate the new law clerk from all cases in which the Legal Aid organization appears as counsel. The judge

also asks if, during the 6-week interim period before the attorney commences employment at the court, the judge may preside (a) over cases that his/her future law clerk has transferred to other Legal Aid attorneys and (b) over routine calendar appearances, arraignments or omnibus motions, or other such matters that the judge considers to be ministerial in nature, in which the attorney appears, after disclosure to and consent of all parties.

A judge must "avoid impropriety and the appearance of impropriety" (22 NYCRR 100.2) and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (22 NYCRR 100.2[A]). This Committee has concluded that a judge need not exercise recusal when his/her law clerk's former employer appears before the judge (see Joint Opinion 07-105/119). Thus, a judge may preside over criminal cases, even if the law clerk was formerly employed in the prosecutor's office (see Opinions 00-66 [Vol. XIX]; 93-132 [Vol. XI]). So, too, may a judge preside over criminal matters in which the defendant is represented by Legal Aid, the law clerk's former employer.

In some situations, however, the law clerk must be insulated from a matter based on his/her prior employment. Where the clerk's former employer is a Legal Aid organization, the judge must make full disclosure and insulate the law clerk from all matters in which the law clerk was personally involved (cf. Joint Opinion 07-105/119). Unlike the rule where the former employer is a private law firm, insulation is not required for matters in which the law clerk was not personally involved (compare Opinion 99-91 [Vol. XVIII]).

Upon application for recusal after disclosure of the law clerk's prior employment and current insulation, a judge should exercise his/her discretion in light of the facts presented in the particular case, in deciding such application (see Joint Opinion 07-105/119).

During the interim period before the attorney commences employment with the court system, the judge should ask the future law clerk for a list of cases that he/she transferred to other Legal Aid attorneys so that the judge can disclose to all parties that his/her future law clerk previously was involved in the matter. The judge may, however, continue to preside as described above.

Finally, the Committee concludes that during this interim period the judge should not preside over any matters in which his/her future law clerk appears, even if the judge deems these appearances to be "routine" or ministerial in nature (cf. Opinion 97-59 [Vol. XV] [requiring disqualification from arraignments in which judge's son was arresting police officer]). The judge has already made a commitment of employment to the attorney that demonstrates a relationship of "particular trust and confidence" between them (see Opinion 07-04) such that the judge's impartiality "might reasonably be questioned" (22 NYCRR 100.3[E][1]) should he/she preside. Disqualification during this interim period is, however, subject to remittal if the judge believes he/she can be fair and impartial (22 NYCRR 100.3[F]; 97-59 [Vol. XV]).

## Comprehensive Ethics Library

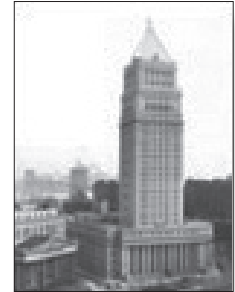


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# Self-Assessment Test

July 2008

## New York Professional Responsibility Report

Receive one-half hour of CLE credit in Ethics and Professionalism by reading the July 2008 issue of NYPRR and answering the following questions. The answers are contained within the newsletter. Return this form, together with your payment of \$15 by check or money order. For both true-false questions and multiple-choice questions, mark the correct box with an "x". You must score 80 (16 out of 20 correct) to receive a certificate.

1. The best first source for research on ethics issues is:
  - the New York Code of Professional Responsibility (Code)*
  - case law*
  - Westlaw.*
2. It's advisable to involve other lawyers in your ethics research because:
  - two heads are always better than one*
  - you may be biased by your self-interest*
  - it's difficult to find a definitive answer to an ethics question.*
3. A New York lawyer with an ethics question:
  - is able to rely entirely on the provisions of the Code*
  - should also research the App. Div. rules and the relevant statutes*
  - may refer the question to the Office of Court Administration.*
4. The rules governing IOLA accounts are contained in:
  - DR 9-102 of the Code*
  - the rules of the Appellate Divisions*
  - Section 497 of the Judiciary Law.*
5. For answers to questions on New York ethics issues, the best treatise is:
  - The Restatement (Third) of the Law Governing Lawyers*
  - the ABA/BNA Lawyer's Manual*
  - Simon's New York Code of Professional Responsibility Annotated.*
6. Ethics Opinions of New York bar associations are usually formulated by:
  - a team of ethics professors at New York law schools*
  - the ethics committee of each association*
  - lawyers especially assigned by each association to study and comment on a specific ethics issue.*
7. The ethics opinions of each bar association are binding on:
  - all lawyers within the area served by the association*
  - only the members of the association*
  - no one.*
8. The American Legal Ethics Library is an ethics website maintained by:
  - the American Bar Association*
  - the National Conference of Bar Examiners*
  - Cornell Law School.*
9. One caveat in using internet blogs for research on ethics is:
  - they represent the opinion of one individual*
  - their comments cannot be relied on without further research*
  - blogs come and go quickly.*
10. The issue explored in Roy Simon's article is: Does the no-contact rule apply to:
  - interviews with an adversary's current employees?*
  - interviews with an adversary's former employees?*
  - communications with public officials?*
11. The first statement of a no-contact rule was in 1908 by:
  - the NYSBA*
  - the ABA in Canon 9*
  - the NY Court of Appeals.*
12. NYSBA Opinion 160 (1970) applied the no-contact rule (DR 7-104(A)(1)) to:
  - the chairman of a public agency*
  - any public agency represented by counsel*
  - officials of a public agency with authority to determine public policy.*

13. NYSBA Opinion 404 (1975) permitted an exception to the no-contact rule in a matter involving:

- a local school board
- the State Assembly
- the principal of a high school.

14. According to CityBar Opinion 1988-8 (1988), before a lawyer may contact the head of an agency about a matter, he must first ask:

- was the official acting in his official capacity or in a private capacity?
- was counsel to the agency appointed by the official?
- does the matter affect the general public or only the lawyer's client?

15. Under the Niesig test, a lawyer may not contact:

- any employee of a corporation or organization in litigation with the lawyer's client
- any employee of the adverse party whose actions or omissions will bind that party
- only those officers of the adverse party with responsibility in the matter.

16. Under CityBar Opinion 1991-4, the opposing attorney was permitted to interview:

- supervisory prison guards
- guards who had witnessed the incident complained of
- only the Commissioner of the Department of Correctional Services.

17. Excluded from the no-contact rule are:

- communications between a lawyer and a press officer authorized to issue public statements for the adversary
- communications with a news reporter
- communications authorized by law.

18. NYSBA Opinion 812 (2007) concerned communication: between a developer's lawyer and:

- the members of the local planning board
- the members of a municipal council
- the members of a local Environmental Appeals Board.

19. When a lawyer believes he has a constitutional right to speak to a public official for purposes of litigation, he should first:

- seek the consent of the lawyer representing the official
- seek the consent of the official
- seek permission from the court, on notice to the official.

20. Roy Simon recommends that:

- contact by a lawyer with a public official represented by counsel be prohibited
- the courts should "balance the interests" in weighing "no-contact" cases involving public policy issues
- communication with public officials on policy issues be encouraged under the "authorized by law" exception to the no-contact rule.

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