

# New York State Bar Association

## Committee on Professional Ethics

Opinion 735 (1/12/01)

Topic: Communications in noncriminal matters with independent contractors of adverse parties

Digest: Lawyer in civil litigation may properly communicate with independent contractor of adverse corporate party unless lawyer knows independent contractor has retained counsel in the matter or, under the Court of Appeals analysis in *Niesig v. Team I*, is represented by the corporation's counsel in the matter. However, lawyer may not knowingly elicit information protected by the attorney-client privilege or the work-product doctrine that the accountant has an obligation to keep confidential.

Code: DR 7-104(A)(1)

### QUESTION

In civil litigation, may a lawyer communicate with an independent contractor hired by the opposing corporate party without obtaining the consent of opposing counsel?

### OPINION

A lawyer represents a party in a civil matter pending in a New York court. The opposing party, a corporation, is represented by counsel in the lawsuit. The lawyer would like to contact and interview an accountant who has been working for the corporation for several hours per week as an independent contractor.

The question of whether the lawyer may interview the accountant is primarily governed by DR 7-104(A)(1), which provides:

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

1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The purpose of this rule is to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches. N.Y. State 652 (1993); N.Y. State 607 (1990).

Outside the criminal context, where the scope and application of the rule has been hotly debated,<sup>1</sup> this Committee and other authorities have uniformly interpreted the rule to apply to any person or entity who is represented in a matter. Thus, the 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. See, e.g., N.Y. State 607 (1990); N.Y. State 656 (1993) (“we have [previously] described DR 7-104’s scope as applicable to represented ‘persons,’ not merely technical parties”) (citing N.Y. State 463 (1977) and N.Y. State 650 (1993)); Roy Simon, *Simon’s New York Code of Professional Responsibility Annotated* 448 (2000 ed.); see also *Monceret v. The Board of Prof’l Responsibility*, 2000 Tenn. Lexis 430 (Tenn. 2000) (attorney barred from communicating with a represented witness); *In re Illuzzi*, 159 Vt. 155 (1992) (attorney barred from communicating with two insurance companies, not named parties in the lawsuit, after they had retained counsel to defend personal injury claims, without defense counsel’s prior consent).

Although the Appellate Divisions, in recently amending the Code, declined to accept the New York State Bar Association’s proposal that the term “party” in DR 7-104 be changed to “person” for reasons of clarity (and not to effect a substantive change in the rule), we do not understand that the decision to retain the term “party” was intended to cut back on the long-standing, universal understanding concerning the scope of DR 7-104(A)(1) in noncriminal cases.

Thus, the question is whether the accountant employed as an independent contractor is known to be “represented” in the matter. (We have previously identified circumstances in which a lawyer has a duty of inquiry before concluding that the individual is unrepresented. See N.Y. State 728 (2000) and opinions cited therein.) If the accountant has personally retained a lawyer to

provide legal assistance to him in connection with the lawsuit (e.g., regarding the accountant's role as a witness), then the accountant is clearly represented for purposes of the rule. In that event, the lawyer may not communicate with the accountant about the matters involved in the lawsuit without the consent of the accountant's counsel.

Assuming the accountant has not personally retained counsel, the question is whether, for purposes of DR 7-104(A)(1), he or she would be considered to be represented by the corporation's counsel. This question is governed by the analysis set forth by the Court of Appeals in *Niesig v. Team I*, 76 N.Y. 2d 363, 371 (1990). In *Niesig*, the Court recognized that "corporations act solely through natural persons, and unless some employees are also considered parties, corporations are effectively read out of the rule." The Court held that when a corporation is represented in a matter, DR 7-104(A)(1) therefore forbids communications with those "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter ego') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally." *Id.* at 374. The Court further stated, "This test . . . permit[s] direct access to employees who [are] merely witnesses to an event for which the corporate employer is sued." *Id.* at 375.

We see no reason why the analysis in *Niesig* would not apply to independent contractors hired by a corporation as it applies to corporate employees and officers. For example, if the lawyer in this inquiry were to know that the accountant had the legal authority to bind the corporation or was responsible for implementing the advice of the corporation's counsel, the lawyer would be prohibited from communicating with the accountant without the consent of the corporation's counsel.

If the accountant has not personally retained counsel in the matter and is not considered to be represented by the corporation's counsel under the *Niesig* standard, however, then DR 7-104(A)(1) would not bar the lawyer from communicating with the accountant. This Committee has consistently opined that a lawyer may properly interview an *unrepresented* witness for the opposing side in a proceeding without the consent of opposing counsel. N.Y. State 577 (1986) (adversary's expert witness); N.Y. State 463 (1977) (child's mother in a paternity proceeding instituted by the Commissioner of Social Services against the putative father).

The extent of permissible communications may be limited, however, if it is known or learned that the accountant possesses information that is protected by the corporation's attorney-client privilege or as attorney work product. We have recognized that a lawyer may not deliberately elicit privileged information from one who is not authorized to make disclosure. N.Y. State 700 (1998). Therefore, the lawyer communicating with the accountant may not knowingly elicit

information protected by the attorney-client privilege or the work-product doctrine that the accountant has an obligation to keep confidential. Further, if the lawyer knows in advance or learns in the course of conversation with the accountant that the only relevant information possessed by the accountant is protected from disclosure, as might be the case if the accountant were retained in the matter to lend expert assistance to the corporation's counsel, *see, e.g., United States v. Schwimmer*, 892 F.2d 237 (1989); *United States v. Kovel*, 296 F.2d 918 (2nd Cir., 1961), then it would be improper thereafter to communicate with the accountant at all concerning the matter even if the accountant were unrepresented.

## CONCLUSION

Under DR 7-104(A), a lawyer who represents a civil litigant may properly communicate with an independent contractor who is employed by the adverse corporate party without consent of opposing counsel if the independent contractor is not represented in the matter. For purposes of the ethical restriction, the independent contractor is "represented" if the independent contractor has retained counsel in the matter or, under the Court of Appeals analysis in *Nieseg v. Team I*, is represented by the corporation's counsel in the matter. In communicating with an independent contractor who is unrepresented, the lawyer may not knowingly elicit information protected by the attorney-client privilege or the work-product doctrine that the accountant has an obligation to keep confidential.

(34-00)

---

<sup>1</sup> The extent to which DR 7-104(a)(1) and the similar "no contact" rule found in Rule 4.2 of the ABA Model Rules of Professional Conduct apply to criminal matters has been the subject of considerable controversy. *See, e.g., Grievance Comm. for S. Dist. of N.Y. v. Simels*, 48 F.3d 640, 643 (1995); *United States v. Israel Santiago-Lugo*, 162 F.R.D. 11, 12 (1995). Consequently, and also because of additional Constitutional considerations that may be applicable in criminal proceedings, the Committee at this time expresses no opinion as to the application of DR 7-104(A) in the criminal context. For an extensive discussion of the issues regarding application of DR 7-104(A) in criminal matters, *see* Bruce A. Green, A Prosecutor's Communications with Defendants: What Are the Limits?, 24 Crim. L. Bull. 283 (1988).