Just When Lawyers Thought It Was Safe to Go Back into the Water

By C. Evan Stewart

Every time I speak to lawyer groups regarding the *Rivera* decision,[1] it is always met with collective gasps, surprise, and sentiments along the lines of "how can that be?!" Since no New York court has yet rejected *Rivera*, or distinguished it away into obscurity, the question at this point for New York lawyers is: What do we do about it? I will make a stab herein at providing an answer (or two).

A Crazy Decision

In *Rivera*, a well-known law firm was representing a hospital against an employment discrimination claim. In the course of that representation the law firm did what most self-respecting law firms would do: it contacted the hospital's employees with first-hand knowledge of the facts and offered to represent them in the litigation at the hospital's expense. After the employees had accepted the law firm's offer, the plaintiff moved to disqualify the firm from the individuals' representation, citing various purported ethics violations.

Although the trial judge did not agree that the law firm had violated DR 5-105 (there was no evidence whatever that the multiple representations constituted a potential conflict of interest), the judge did find that the firm had violated DR 2-103(A)(1).[2] That rule bars lawyers from "soliciting" clients directly (e.g., in person), unless the prospective client happens to be "a close friend, relative, former client or current client."[3]

What was the judge's legal authority for this unusual finding? Ignoring whether a "significant motive" for the law firm in "soliciting" the employees was "pecuniary gain" (as the rule requires), he reached back to a 1990 decision by the New York Court of Appeals: *Niesig v. Team 1*.[4] In *Niesig*, the Court of Appeals held that a lawyer representing an injured worker suing his company could interview, *ex parte*, employees of the company notwithstanding the general ethical prohibition against such communications under New York's "no-contact" rule (DR 7-104(A)(1)—now Rule 4.2). According to *Niesig*, only a company's "alter egos" are protected under the "no contact" prohibition; and the general policy undergirding the *Niesig* ruling is that opening up the number of employees opposing counsel can contact *ex parte* furthers the "informal discovery of information" and serves both the litigants and the entire judicial system by uncovering relevant facts, thus promoting the expeditious resolution of disputes.[5]

Thus armed with the *Niesig* policy in favor of "informal discovery," the *Rivera* judge ruled that:

> [The employees were clearly solicited by [the law firm] on behalf of [the hospital] to gain a tactical advantage in this litigation by insulating them from informal contact with plaintiff's counsel. This is particularly egregious since [the law firm], by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of *Niesig* in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court.[6]

Many observers (including this author) waited anxiously for *Rivera* to be reversed. Why? Well, for starters: (i) the "non-solicitation" rule clearly has nothing to do with this type of situation;[7] (ii) even if the rule were somehow applicable, the trial court had not even considered the issue of "pecuniary gain" (presumably, because there was none to the law firm);[8] and (iii) query how the *Niesig* policy in favor of "informal discovery" had any relevance to this situation. Unfortunately, in a terse opinion issued in May 2010, the Appellate Division, Second Department affirmed the lower court: "Contrary to the contention of the nonparty appellant, the record supports the Supreme Court's determination that it engaged in acts of solicitation of professional employment, in violation of former Code of Professional Responsibility DR 2-103(a)(1) (22 N.Y.C.R.R. 1200.8[a][1]), now Rules of Professional Conduct (22 N.Y.C.R.R. 1200.0) rule 7.3."[9]

Putting to one side the logic, wisdom, sensibility, and anything else with respect to this crazy decision, it currently stands as existing case law in the Empire State.[10] So what should lawyers faced with this everyday situation do when confronted with it?

Practical Responses to *Rivera*

One approach to dealing with *Rivera* might be to pretend it does not exist, or that it only applies to legal conduct in the Appellate Division, Second Department. To paraphrase Richard Nixon, one could try that, "but it would be *wrong*."

Another approach would be to view that decision as having been heavily influenced by the trial court's clear frustration with defense counsel's "history in this litigation of improperly thwarting plaintiff's attempts to obtain discovery."[11] Thus, in cases where there are not additional allegations of lawyer impropriety vis-à-vis discovery, perhaps *Rivera* may be distinguishable and reaching out to corporate employees may well be in the category of apple pie, the flag, and Mom. As Tom Cruise would tell us, however, that could be "Risky Business."

Some have suggested that in-house counsel or a non-lawyer within the company should reach out to the employees or former employees with the offer of legal representation at no cost to the individual(s). These may or may not work. As to the latter, lawyers need to remember that they cannot direct others to do that which they are ethically proscribed from doing.[12]

A variation on that theme—which may supply more comfort—would be to have a corporate policy which makes clear that, with respect to actions undertaken in the normal course of an individual's corporate duties, the company will supply counsel at no cost to the individual, if the individual voluntarily agrees to such representation. Short of the next suggestions, this is about the best I can come up with.

The ultimate protection would either come from a decision by the New York Court of Appeals rejecting *Rivera*, or for there to be an amendment to the "non-solicitation" rule. The latter is precisely what the Committee on Professional Responsibility for the Association of the Bar of the City of New York proposed in the summer of 2011. Critical of *Rivera*, but not seeing a bullet-proof mechanism to protect lawyers, the Committee proposed the following amendment to Rule 7.3(a)(1):

> (a) A lawyer shall not engage in solicitation:
>
> (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client, existing client, *or current or former employee of an existing client and the communication is in connection with the representation of the existing client;….* (proposed amendment in italics)

To date, no action has been taken on the Committee's proposal.

Conclusion

Judges, like lawyers, do not always get it right. Until we get some greater clarity on how to deal with *Rivera*-like situations, however, that truism poses some real risks to lawyers who regularly represent corporations *and* their employees. Before sticking your toe into this water, carefully weigh your options.[13]

Endnotes

1. *Rivera v. Lutheran Medical Center*, 866 N.Y.S.2d 520 (N.Y. Sup. Ct., Kings County 2008), *aff'd*, 899 N.Y.S.2d 859 (2d Dep't 2010). When the lower court decision was handed down, I publicly criticized its holding and rationale(s). *See* C. E. Stewart, *How One Bad Ruling Can Spoil a Whole Bunch of Cases*, N.Y. L. J. (January 8, 2009).
2. The *Rivera* court was citing the pre-2009 sections of the New York Rules of Professional Conduct. Post April 1, 2009, those rules were over-hauled and now use the numbering system employed by the American Bar Association's Model Rules of Professional Conduct. DR 2-103's replacement is Rule 7.3; there are no material differences between the two "anti-solicitation" rules.
3. The rationale for this non-solicit rule is best expressed in Comment 1 to A.B.A. Model Rule 7.3:

   > There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasonable judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching. Model Rules of Prof'l Conduct R. 7.3 (2010).

   This rationale was obviously not present in the *Rivera* case—the law firm told the employees that their decision was completely voluntary and there would be no impact on their employment if they declined representation.
4. 76 N.Y.2d 363, 558 N.E.2d 1030 (1990). The trial judge also relied upon *United States v. Occidental Chemical Corp.*, 606 F. Supp. 1470 (W.D.N.Y. 1985). Putting to one side whether the *Occidental* decision was in fact coherent, the court in *Occidental* specifically *declined* to disqualify counsel who had solicited (and was retained by) a former employee, even though "some tactical advantage might be gained by representing both [the corporation and the former employee]." *Id*. at 1475.
5. As readers of this column will recall, I am not a big fan of the *Niesig* decision on a whole host of fronts. *See* C. E. Stewart, *When Exceptions Swallow the Rule: The Growing Demise of the "No-Contact" Rule*, N.Y. Bus. L. J. (Spring 2008).
6. The *Rivera* judge also reported the law firm's "misconduct" to the New York State Disciplinary Committee.
7. *See* Model Rules of Prof'l Conduct R. 7.3, *supra* n. 3.
8. The trial judge's focus on "tactical advantage" instead of "pecuniary gain" shows how off the track this ruling really was. Of course the law firm was seeking a tactical advantage for its client—that is what lawyers are supposed to do! *See* Simon Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 10 Record (1975).
9. 899 N.Y.S. 2d 859, 859 (2d Dep't 2010). Interestingly, on oral argument before the Second Department, there was a good deal of focus on the "pecuniary gain" issue. Why that never factored into the court's 2010 ruling is puzzling and troubling.
10. Unfortunately, one federal magistrate judge in New York was subsequently impressed with *Rivera*. *See Matusick v. Erie County Water Authority*, 2010 WL 681062 (W.D.N.Y. Feb. 22, 2010). A federal judge in Oklahoma, however, expressly rejected *Rivera*. *See Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, 2010 WL 1558554 (W.D. Okla. April 19, 2010).
11. 866 N.Y.S.2d at 526.
12. *See* N.Y. Rules of Professional Conduct R. 8.4(a). *See also*, *United States v. Occidental Chemical Corp.*, 606 F. Supp. 1470, 1477 (W.D.N.Y. 1985).
13. Of course, just opening your apartment door can be dangerous, as well—just ask Gilda Radner, Laraine Newman, Jane Curtin, or Candace Bergen. *See* SNL Transcripts (November 8, 1975) ("Landshark," "The cleverest species of them all," and "Candygram….").

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