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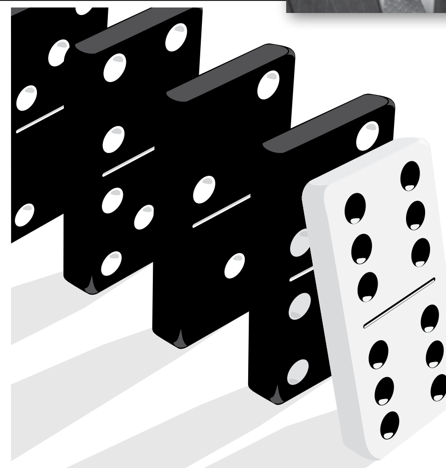
LITIGATION

How One Bad Ruling Can Spoil a Whole Bunch of Cases



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Over the judges' bench in the Moot Courtroom at the Cornell Law School is the famous legal maxim: "The Law must be stable, yet it cannot stand still." That maxim, of course, is the very embodiment of the common law—wise and sober judicial precedent, built upon earlier, wise and sober judicial precedent. But it does not always work that way. Case in point: *Niesig v. Team I*.[1]

In *Niesig*, the New York Court of Appeals in 1990 held that a lawyer representing an injured worker suing his company could interview, ex parte, employees of the company. New York's "no-contact" rule (DR 7-104(A)(1)) was held to apply only to those current employees "whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or important to the corporation for purpose of its liability, or employees implementing the advice of counsel." Believing that the "alter ego" test it created would "become relatively clear in application," the Court concluded that its ruling would further the "informal discovery of information" and "serve both the litigants and the entire judicial system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."

In adopting its definition for what constitutes a party for purposes of DR 7-104(A)(1),[2] the Court considered and rejected not only a standard based upon that which had been determined by the U.S. Supreme Court in *United States v. Upjohn* (where each corporate employee was deemed to be a client for purposes of the attorney-client privilege),[3] but also a "control group" test (i.e., only those who "control" a company may not be contacted) because of "practical and theoretical problems." With respect to the *Upjohn* decision, the New York Court of Appeals determined that the attorney-client privilege was "an entirely different subject" from the "no-contact rule," and that "a corporate employer who may be a 'client' for purposes of the attorney-client privilege is not necessarily a 'party' for purposes of DR 7-104(A)(1)." (Further discussion of this issue can be found in another article on this page, "When Outside Counsel Represent Individuals: Perils and Precedent.")

Immediate Problems

No sooner had the *Niesig* decision been handed down than it was clear that there were a number of problems/issues with this "relatively clear" decision.[4] The first concerned the risk of disqualification or professional sanctions. How is an attorney who wants to interview a current employee going to know in advance whether he or she is a corporate "alter ego"?

C. EVAN STEWART *is a partner at Zuckerman Spaeder and adjunct professor at Fordham Law School and Brooklyn Law School.*

As one California court looking at this quandary expressed: an attorney in such circumstances would be forced to make a "unilateral decision…based upon *expectations or predictions*."[5]

An obvious illustration of this quandary is posed by the hearsay exception set forth in Rule 801(d)(2)(D) of the Federal Rules of Evidence. A statement is not hearsay if it is "offered against a party and is…a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Before conducting an ex parte interview, however, an attorney will be at risk as to whether the employee's knowledge of relevant facts comes from outside the scope of his or her employment.

The *Niesig* Court brushed this issue to one side because the hearsay rule in New York is different from Rule 801(d)(2)(D); in New York, very few employees are in a position to bind their companies by their statements.[6] But what about jurisdictions that do not have an evidentiary rule similar to New York's, but which nonetheless choose (or have chosen) to follow *Niesig*?[7] Or what about a New York federal court sitting in diversity, seeking to apply *Niesig's* substantive rule, while being bound to apply the Federal Rules of Evidence?[8]

Another concern relates to whether the "alter ego" test is in fact "relatively clear in application" (as the New York Court of Appeals prophesied) or whether it leads to another procedural/litigation layer, with lawyers uncertain on how best to proceed. One look at the federal courts in New Jersey would suggest a not so sanguine answer.[9] And the disparate treatment in just that one federal district is only a tip of the iceberg as to the satellite litigation that has been spawned in this area.[10]

Niesig also represents the diminishment of the attorney-client privilege. Notwithstanding the New York Court of Appeals' declaring that the privilege has nothing whatever to do with the "no-contact" rule, just saying so does not make it so. In fact, one of the basic policies underlying that rule is the need to protect communications and information covered by the privilege and the attorney work product doctrine.[11] And as the U.S. Supreme Court made clear in *Upjohn*, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[12] Consistency with *Upjohn* would therefore require that an employee who is a "client" for privilege purposes (i.e., one who gives information and receives advice) should also be a "party" for purposes of the "no-contact" rule.[13]

Expanding a Precedent

Not content with how other courts have struggled with *Niesig*,[14] the New York Court of Appeals has returned to the scene of the crime—first in *Muriel Siebert & Co. v. Intuit Inc*.[15] In that case, the chief operating officer of Siebert, who was directly involved in ongoing litigation with Intuit, was contacted and interviewed by Intuit's lawyers immediately upon their hearing of his termination by the company. Notwithstanding that the COO had indisputably been a Siebert "alter ego" for purposes of the *Niesig* test, the Court reasoned that because he was no longer an employee at the time of the ex parte interview, that meant that Intuit's lawyers had done nothing wrong.

The Court further reasoned that because Intuit's lawyers had been careful not to elicit privileged information from the ex-COO, the interview had merely served to facilitate *Niesig's* policy goal of furthering the "informal discovery of information," and thus there were no other ethical issues of any kind implicated by their actions.[16]

Just months after *Siebert*, the New York Court of Appeals struck again in *Arons v. Jutkowitz*.[17] There, the Court held that defense lawyers in a medical malpractice action could conduct ex parte interviews with the plaintiff's doctor. After reviewing its prior rulings in *Niesig* and *Siebert*, the Court determined that there was no reason why there should not be informal discovery in this context, as well. As to whether doctors could be "gulled into making an improper disclosure," the Court was unmoved, having previously rejected such a concern for corporate employees (*Niesig*) and former corporate big-wigs (*Siebert*).

Careening Out of Control

Niesig took an even sharper turn in *Gidatex v. Campaniello Imports, Ltd*.[18] In that case, a plaintiff's lawyer in a trademark enforcement case sent undercover investigators into the defendant's furniture showroom in order to prove that the defendant had engaged in "bait and switch" tactics. Wearing hidden wires, the investigators taped their discussions with the defendant's employees; the plaintiff's lawyer then sought to introduce the tapes at trial to impute liability to the defendant. An outraged defendant moved to preclude the tapes on the ground that a lawyer cannot send a non-lawyer to do that which a lawyer is ethically barred from doing (e.g., be deceptive, violate the "no-contact" rule, etc.).[19]

The *Gidatex* court, in the Southern District of New York, relying upon *Niesig's* non-"bright-line rule" and a New Jersey federal court that had applied *Niesig* in a similar situation,[20] ruled that the tapes were admissible. Although the judge found that plaintiff's counsel had "technically" violated applicable ethics rules, she also found that the lawyer had not substantively violated those rules "because his actions simply do not represent the type of conduct prohibited by the rules."[21]

As if the foregoing non-sequitur were not troubling enough, the *Niesig-Gidatex* precedent was thereafter taken to another level. On May 23, 2007, the New York County Lawyers' Association's Committee on Professional Ethics issued Formal Opinion 737. Drawing directly on the *Gidatex* decision, the committee explicitly endorsed an ethical safe harbor for lawyers who employ "dissemblance" in the evidence gathering process; in other words, the committee believed that there should be formal exceptions to the broad admonition against lawyers engaged in "dishonesty, fraud, deceit, or misrepresentation"—so long as the "informal discovery of information" is promoted. Yikes!

But wait, there is more. Just recently, *Niesig* has been taken to a new place altogether. In *Rivera v. Lutheran Medical Center*,[22] 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 firm's offer, the plaintiff moved to disqualify the firm from those representations, citing various, purported ethics violations.

Although the 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). That rule bars lawyers from "soliciting" clients directly (e.g., in person), unless the prospective client "is a close friend, relative, former client or current client."[23] The judge's legal authority for this unusual finding? *Niesig*:

> [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.[24]

The *Rivera* decision is not only dead wrong, but—until reversed by a higher court or rejected by other courts—it may also (and significantly) impact how corporate lawyers think about and deal with individuals within the corporate entity. Because of *Niesig's* sophistry in attempting to delineate between "clients" and "parties"—all in furtherance of the "informal discovery of information," are we now at a point where corporate employees may not be considered a corporate lawyer's "clients"? Has the world, as determined by the U.S. Supreme Court in *Upjohn*, been completely inverted? Stay tuned!

Conclusion

The legend of Johnny Appleseed (a/k/a John Chapman) is that he spread apple seeds throughout Ohio, Indiana, and Illinois at the beginning of the 19th century, and that by his kind and generous efforts, generations of Americans benefited from plentiful apple trees. Unfortunately, the New York Court of Appeals' decision in *Niesig* was a bad seed which has spread to and infected many other areas of the law. It can only be hoped that wiser judicial heads will start nipping the *Niesig* buds before they spread further.

No sooner had the 'Niesig' decision been handed down than it was clear that there were a number of problems/issues. The first concerned the risk of disqualification or professional sanctions. How is an attorney who wants to interview a current employee going to know in advance whether he or she is a corporate 'alter ego'?

1. 76 NY2d 363, 559 NYS2d 493, 558 N.E.2d 1030 (1990). The old English jurist William Scott had a somewhat different take on the workings of the common law: "A precedent embalms a principle." The Yale Book of Quotations 675 (ed. F. Shapiro) (Yale 2006).

2. The "no-contact" protocol under the ABA's Model Rules is Model Rule 4.2, which provides that "a lawyer shall not communicate…with a person the lawyer knows to be represented by another lawyer in the matter." This rule, which many (but not all) states have adopted in whole or in part, was clarified in 1995, when the word "person" was substituted for "party" so as to ensure that the ex parte ban covered, inter alia, pre-litigation contexts. Unlike ABA Model Rule 4.2, New York's DR 7-104(A)(1) has always applied to a "party," as opposed to a "person."

3. 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court recognized that "[m]iddle-level and indeed lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that their employees would have relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." Id. at 391.

4. In fact, some of the problems in the Court's decision were featured in one of my very first columns for the New York Law Journal. See "Whither the Attorney-Client Privilege," NYLJ, Oct. 11, 1990. See also R. Zitrin and C. Langford, Legal Ethics in the Practice of Law 157-61 (Michie 1995).

5. *Mills Land & Water Co. v. Golden West Refining Co.*, 189 Cal. App. 3d 116, 129-30, 230 Cal. Rpt. 461, 468 (1986) (emphasis in original).

6. See Committee on Professional Ethics, Association of the Bar of the City of New York, Inquiry Reference No. 80-46 (1980).

7. See, e.g., *Messing, Rudavsky & Weliky v. President and Fellows of Harvard College*, 764 N.E.2d 825 (Mass. 2002); *Stranser v. Exxon Co. U.S.A.*, 843 P.2d 613 (Wyo. 1992); *Dent v. Kaufman*, 406 S.E.2d 68 (W. Va. 1991).

8. Once having allowed the interviews, the New York federal court would also have to allow into evidence any statements made by the employee within the scope of their employment, pursuant to Rule 801(d)(2)(D). See *Polycast Technology Corp. v. Uniroyal Inc.*, 129 FRD 621 (SDNY 1990).

9. Compare *Public Service Electric & Gas Co. v. Associated Electric Gas Insurance Services Ltd.*, 745 F.Supp. 1037 (D. N.J. 1990) (ex parte communication barred with present or former employees) with *Curley v. Cumberland Farms Inc.*, 134 FRD 77 (D. N.J. 1990) (ex parte communications allowed with former employees, unless they played a central role in the controversy in dispute) with *In re Prudential Insurance Co. of America Sales Practices Litigation*, 911 F.Supp. 148 (D. N.J. 2000) (ex parte communications allowed with former employees, except for those in the company's "litigation control group").

10. Compare *Orlowski v. Dominick's Finer Foods Inc.*, 937 F.Supp. 723 (N.D. Ill. 1996); *Valasses v. Samuelson*, 143 FRD 118 (E.D. Mich. 1992); *Dubois v. Gradco Systems Inc.*, 136 FRD 341 (D. Conn. 1991) with *Armsey v. Medshores Management Services Inc.*, 184 FRD 569 (W.D. Va. 1998); *Lang v. Reedy Creek Improvement District*, 888 F.Supp. 1143 (M.D. Fla. 1995); *Midwest Motor Sports Inc. v. Arctic Cat Sales Inc.*, 144 F.Supp.2d 1147 (D. S.D. 2001); *Palmer v. Pioneer Inn Associates, Ltd.*, Nev. S.C., No. 38213 (Dec. 27, 2002), BNA U.S. Law Week 1411 (Jan. 14, 2003).

11. See *Blanchard v. Edgemark Financial Corp.*, 175 FRD 293, 302 & n.10 (N.D. Ill. 1997); *Candler v. State of Maryland*, 910 F.Supp. 1115, 119-20 (D. Md. 1996); see also ABA Formal Ethics Op. 95-396 (1995); S. Miller & A. Cairo, "Ex Parte Contact With Employees and Former Employees of a Corporate Adversary: Is It Ethical?" 42 Business Lawyer 1053, 1054-55, 1060-65, 1071 (1987). Another reason for the rule is to protect unknowledgeable people from unscrupulous lawyers.

12. 449 U.S. at 390.

13. See Hazard & Hodes, Law of Lawyering 437 (1985) (an employee covered by the privilege, as per *Upjohn*, should be considered a "party" under the ethical rules). Indeed, the *Niesig* court's client/party dichotomy does not stand up to scrutiny because the status, knowledge, and/or responsibility of an employee should be irrelevant for purposes of whether an ex parte contact is permissible. An employee who can bind the company may be just as much in possession of underlying facts as one who cannot. Moreover, if "uncovering relevant facts" is the uppermost policy goal, should there be any difference as to which type of employees may invoke this protection? Finally, as indicated above, the policies served by the privilege and the "no contact" rule are, in fact, aligned.

14. See supra notes 9 & 10.

15. 8 NY3d 506, 868 N.E.2d 208, 836 NYS2d 527 (2007).

16. While the *Siebert* Court's decision is in line with ABA Model Rule 4.2 and a number of jurisdictions, that is not the consensus view throughout the United States, especially as to ex-employees who had been in the "litigation control group." See supra notes 9 & 10. See also *Kaiser v. Am. Tel. & Tel.*, 2002 WL 1362054 (D. Ariz. 2002); *Camden v. Maryland*, 910 F.Supp. 115 (D. Md. 1996); *Rentclub Inc. v. Transamerica Rental Fin. Corp.*, 811 F.Supp. 651 (M.D. Fla. 1992); *Chancellor v. Boeing Co.*, 678 F.Supp. 250 (D. Kan. 1998). See generally Cohn, "The Organizational Client: Attorney-Client Privilege and the No-Contact Rule," 10 Geo. J. Legal Ethics 739 (1997).

17. 2007 WL 4163865 (Nov. 27, 2007).

18. 82 F.Supp.2d 119 (SDNY 1999).

19. See ABA Formal Opinion 95-396; see also ABA Model Rules 5.3(c) & 8.4(a); DR 1-102(A)(1), DR 1-102(A)(4), & DR 1-104(D).

20. See *Apple Corp. Ltd., MPC v. Int'l Collectors Society*, 15 F.Supp.2d 456 (D. N.J. 1998).

21. For contrary authority on this point, see *Midwest Motor Sports v. Arctic Sales Inc.*, 347 F.3d 693 (8th Cir. 2003).

22. No. 22050-2005 (N.Y. Sup. Ct. Kings Cty., Oct. 16, 2008), NYLJ, Oct. 28, 2008.

23. The rationale for this non-solicit rule is best expressed in Comment 1 to ABA 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 reasoned 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.

This rationale is 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.

24. The judge also reported the law firm's "misconduct" to the New York State Disciplinary Committee.