

Ethical Issues for Business Lawyers

When Exceptions Swallow the Rule: The Growing Demise of the “No-Contact” Rule

By C. Evan Stewart

The concept of the “slippery slope” is one with which every lawyer (indeed, every first-year law student) is familiar.¹ In one part of the attorneys’ code of professional responsibility—the “no-contact” rule, embodied by ABA Model Rule 4.2—the slope has gotten pretty slippery indeed.

The Model Rule

Under Rule 4.2, “a lawyer shall not communicate . . . with a person the lawyer knows to be represented by another lawyer in the matter.”² 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.

The basic policies implicated by the “no-contact” rule are numerous. Principal among them is the need to protect communications and information covered by the attorney-client privilege and work product doctrine, as well as a desire to protect unknowledgeable people from unscrupulous lawyers.³

The Slippery Slope Begins

The “no-contact” rule was once fairly unremarkable, and not much litigated, until the New York Court of Appeals decided *Niesig v. Team I*.⁴ In *Niesig*, the Court held that a lawyer representing an injured worker suing his company could interview, *ex parte*, employees of the company.⁵ New York’s “no-contact” rule, DR 7-104(A)(1), was held to apply to only 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 imputed to the corporation for purpose of its liability, or employees implementing the advice of counsel.”⁶ Believing that the “alter ego” test it created would “become relatively clear in application,”⁷ the Court concluded that its ruling would further the “informal discovery of information” and “serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes.”⁸

In adopting its definition of what constitutes a party for purposes of DR 7-104(A)(1),⁹ the Court considered and rejected not only a standard based upon that which had been determined by the U.S. Supreme Court in *U.S. v. Upjohn* (where each corporate employee was deemed to be a client for purposes of the attorney-client privilege),¹⁰ but also a “control group” test (i.e., only those who

“control” a company may not be contacted) because of “practical and theoretical problems.”¹¹ 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 employee 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).”¹²

Paradise Starting to Get Lost

Right off the bat, the *Niesig* decision created a number of problems/issues. The first concerns the risk of disqualification or professional sanction/discipline. How will an attorney who wishes to interview a current employee know whether he or she is an “alter ego” employee? As one California court that has faced this issue put it, an attorney would have to make a “unilateral decision . . . based upon *expectations or predictions*.”¹³

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.”¹⁴ Before an interview, however, an attorney will have some (or great) difficulty in knowing whether an employee’s knowledge of relevant facts comes from outside the scope of his or her employment.

The *Niesig* Court brushed this concern aside because the hearsay rule in New York is different from Rule 801(d)(2)(D). Under New York’s evidentiary rule, few employees are in a position to bind their companies by their statements.¹⁵ Even assuming the correctness of that analysis, however, what about jurisdictions which do not have an evidentiary rule similar to New York’s, but which nonetheless choose to follow the *Niesig* holding,¹⁶ or 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?¹⁷

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.¹⁸ And that disparate treatment/confusion is only a tip

of the iceberg as to the satellite litigation that has been spawned in this area.¹⁹

The *Niesig* decision 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.²⁰ As the U.S. Supreme Court made clear in *Upjohn*, "the privilege exists to protect not only the giving of information to the lawyer to enable him to give sound and informed advice."²¹ Accordingly, to be consistent with *Upjohn*, 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.²²

Finally, how does one reconcile the policy of protecting unknowledgeable people from unscrupulous lawyers with the policy embraced by the Court of Appeals—the "informal discovery of information"? Clearly, New York's highest court placed the latter policy on a higher plane. The *Niesig* Court in fact seemed to believe that the facts are the facts, regardless of whether one gets them pre- or post-horse-shed preparation by the opposing side's lawyer.²³ Of course, if that were true then lawyers would see no tactical advantage in seeking out *ex parte* interviews, but would instead merely await depositions. As they say in Latin, *res ipsa loquitur*.

Oops, They Did It Again

Some commentators (not me, of course) believe that *Niesig* draws "a sensible line" between who can and cannot be contacted *ex parte*.²⁴ But even they could not have predicted how far the New York Court of Appeals would take its "relatively clear" standard and its "informal discovery" policy.

In *Muriel Siebert & Co. v. Intuit Inc.*,²⁵ a business alliance between the brokerage firm (Siebert) and the financial software maker (Intuit) went south. That led to Siebert suing Intuit for, *inter alia*, breach of contract and breach of fiduciary duty.²⁶

The COO of Siebert was a key participant in the Intuit alliance, and (by the Court of Appeals' own recognition) he was also a key member of Siebert's "litigation team" once the Intuit litigation had been instituted (i.e., a Siebert "alter ego" and part of its "litigation control group").²⁷ Eventually, however, the COO had a falling out from the company and he was terminated.²⁸

Immediately after hearing of the COO's termination, Intuit's lawyers contacted him and thereafter interviewed him *ex parte*.²⁹ Once Siebert's lawyers learned of the *ex parte* interview, they moved to disqualify Intuit's lawyers and to bar Intuit from using any of the information gleaned from the interview.³⁰

The trial court granted the motion, disqualified Intuit's lawyer, ordered the destruction of any and all

interview notes, and barred the disqualified lawyers from passing on any tainted information to Intuit's new lawyers.³¹ The court did not base its decision upon DR 7-104(A)(1), however, on the ground that the COO was a former employee; instead, it disqualified Intuit's lawyers citing the "appearance of impropriety" standard.³²

The Appellate Division reversed that ruling. It did so because: (i) it believed *Niesig* had made "it clear that *ex parte* interviews of an adversary's former employees are neither unethical nor legally prohibited"; and (ii) Intuit's lawyers had cautioned the ex-Siebert COO not to disclose privileged information (and it appeared that that advice had been followed).³³

On appeal to the New York Court of Appeals, the Court affirmed the Appellate Division.³⁴ Notwithstanding the fact that the COO had indisputably been a Siebert "alter ego" for purposes of the *Niesig* test, the Court reasoned that because he no longer was an employee at the time of the *ex parte* interview, that meant Intuit's lawyers had done nothing improper.³⁵ And because the lawyers had been careful not to elicit privileged information from the ex-COO, the interview had merely served to facilitate the Court's policy goals of furthering the "informal discovery of information," and there were thus no grounds to disqualify them.³⁶

While the *Siebert* Court's decision is in line with ABA Model Rule 4.2 and a number of jurisdictions—i.e., the *ex parte* rule only applies to current employees—that is not the consensus view throughout the United States, especially as to ex-employees who had been in the "litigation control group."³⁷ Beyond being careful (and knowledgeable) as to the jurisdictions in which one undertakes to contact ex-employees, what other lessons can be gleaned from *Siebert*?

Obviously, if you are the *ex parte* inquiring lawyer you must be very clear and explicit in giving privilege warnings to the ex-employee. As for companies facing such scenarios, it further reinforces the employment leverage that key managerial individuals have during the pendency of important litigation—i.e., in the words of Don Corleone, it is better to keep your friends close, but your enemies closer. Alternatively, companies may want to consider having an ongoing legal representation provision as part of their termination agreements; presumably, key ex-employees would be happy to have their former employers pay the freight of legal representation, in exchange for not agreeing to sit for *ex parte* interviews with the opposition.³⁸

Good Things Come in Threes?

Just months after *Siebert*, the New York Court of Appeals decided to go itself one better. In *Arons v. Jutkowitz*,³⁹ the Court held that defense lawyers in a medical malpractice action could conduct *ex parte* interviews with the plaintiff's doctor.⁴⁰ The Court also ruled that any attorney

work product generated in conjunction with the *ex parte* interviews was immune from discovery.⁴¹

While much of the decision wallows in medical minutiae mandated by the Health Insurance Portability and Accountability Act of 1996,⁴² the Court's decision is, at bottom, a further refinement/extension of *Niesig*. After recounting its prior rulings in *Niesig* and *Siebert*, the Court determined that there was no reason why there should not be informal discovery (i.e., *ex parte* interviews) of non-party treating physicians as well.⁴³ To the concern that doctors may be "gulled into making an improper disclosure," the Court was completely blasé, having previously rejected such a concern for corporate employees (*Niesig*) and a former corporate executive (*Siebert*).⁴⁴

Whether the *Arons* decision is going "to open a small floodgate of attempts by insurance companies and defense lawyers to privately approach treating physicians without the knowledge or permission of the patients and take statements without their counsel" remains to be seen.⁴⁵ What we do know, however, is that the exceptions in New York to the "no-contact" rule seem to be getting bigger and bigger and bigger.⁴⁶ And that is not even the end of it!

Dirty Tricks

In *Gidatex v. Campaniello Imports, Ltd.*,⁴⁷ the plaintiff's lawyer in a trademark infringement case sent undercover investigators into the defendant's furniture showroom in order to prove that the defendant had engaged in "bait and switch" tactics.⁴⁸ The investigators surreptitiously taped their discussions with the defendant's employees, and the plaintiff's lawyer then sought to introduce the tapes at trial to impute liability to the defendant.⁴⁹ The 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 (i.e., be deceptive, violate the "no-contact" rule, etc.).⁵⁰

The *Gidatex* court, liberally citing *Niesig*'s non "bright-line rule" and a New Jersey decision which applied *Niesig* in a similar situation,⁵¹ ruled that the tapes were admissible.⁵² Although the trial judge determined that plaintiff's counsel had "technically" run afoul of applicable ethics rules, she ruled he did not substantively violate those rules "because his actions simply do not represent the type of conduct prohibited by the rules."⁵³ This seeming nonsequitur was justified/explained by the fact that the investigators did not engage in an interrogation of the defendant's employees, but instead "merely" recorded the employees' ordinary business pattern.⁵⁴

Gidatex has been rejected by subsequent courts,⁵⁵ and has been criticized by ethics gurus,⁵⁶ but it recently got a big shot in the arm from the New York County Lawyers' Association's Committee on Professional Ethics.

On May 23, 2007, the Committee issued Formal Opinion 737, which endorsed an ethical safe harbor for lawyers who employ "dissemblance" in the evidence-gathering process. Adopting the *Gidatex* model for ethically permissible behavior, the Committee's Opinion expressly stands for the proposition that—in the Association's view—there should be formal exceptions to the broad admonition against lawyers engaging in "dishonesty, fraud, deceit, or misrepresentation."⁵⁷

Conclusions

Whether lawyers should take much comfort (let alone act upon) the New York County Lawyers' Association's Opinion is open to robust debate. But it does demonstrate just how far the law (and sentiment) have moved since the *Niesig* Court handed down its "relatively clear" decision endorsing "informal discovery" 18 years ago. If in fact "informal discovery" is so important, maybe the "no-contact" rule should be scrapped altogether? Given how much of it has been eviscerated to date, we might not have too far to go.

Endnotes

1. To my surprise, it turns out that there are a number of learned treatises on the "slippery slope." See, e.g., F. Schaver, *Slippery Slopes*, 99 HARV. L. REV. 360 (1985); E. Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469 (1999); E. Volkh, *Mechanism of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003); M. Rizzo & G. Whitman, *The Camel's Nose is in the Tent: Rules, Theories and Slippery Slopes*, 51 U.C.L.A. L. REV. 539 (2003).
2. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1995).
3. See *Blanchard v. Edgemark Fin. Corp.*, 175 F.R.D. 293, 302, n.10 (N.D. Ill. 1997); *Candler v. Md.*, 910 F. Supp. 1115, 1119–20 (D. Md. 1996); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 396 (1995); S. Miller & A. Cairo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?* 42 BUS. LAW. 1053, 1054–55, 1060–65, 1071 (1987).
4. 76 N.Y. 2d 363, 559 N.Y.S.2d 493 (1990).
5. *Id.* at 376, 559 N.Y.S.2d at 499.
6. *Id.* at 374, 559 N.Y.S.2d at 498.
7. *Id.* at 375, 559 N.Y.S.2d at 499.
8. *Id.* at 372, 559 N.Y.S.2d at 497.
9. Unlike the ABA's Model Rule 4.2, New York's DR 7-104(A)(1) has always applied to a "party," as opposed to a "person."
10. 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 the 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.
11. The *Upjohn* Court had also rejected the "control group" test. At present, at least four states (Arizona, Kansas, Idaho, and Illinois) employ this test.
12. *Niesig*, 76 N.Y.2d at 371–72, 559 N.Y.S.2d 497.
13. *Mills Land & Water Co. v. Golden West Ref. Co.*, 230 Cal Rpt. 461, 468 (1986).
14. FED. R. EVID. 801(d)(2)(D).

15. *Niesig*, 76 N.Y.2d at 374, 559 N.Y.S.2d at 498. More than a decade before, this issue had been flagged by the Committee on Professional Ethics of the Association of the Bar of the City of New York. See *Assoc. of the Bar of the City of N.Y., Comm. on Prof'l Ethics, Inquiry Reference No. 46* (1980).
16. See, e.g., *Messing, Rudavsky & Weliky v. President & Fellows of Harvard Coll.*, 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).
17. 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 his or her employment, pursuant to Rule 801(d)(2)(D). See *Gidatex v. Campaniello Imp., Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (see *infra* notes 24–26 and accompanying text). If, on the other hand, the court were to look to ABA Model Rule 4.2, it could conclude that the company is protected—not only as to those who could be interviewed, but with respect to evidentiary exposure as well. See *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990).
18. *Compare Pub. Serv. Elec. & Gas Co. v. Assoc. Elec. & Gas Ins. Serv. Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990) (ex parte barring communication with present or former employees) with *Curley v. Cumberland Farms Inc.*, 134 F.R.D. 77 (D.N.J. 1990) (allowing ex parte communications with former employees, unless they played a central role in the controversy in dispute), with *In re Prudential Ins. Co. of America Sales Practices Litig.*, 911 F. Supp. 148 (D.N.J. 1995) (allowing ex parte communications with former employees, except for those in the company's "control group"), and with *Andrews v. Goodyear Tire & Rubber Co. Inc.*, 191 F.R.D. 59 (D.N.J. 2000) (allowing ex parte communications with former employees, except for those in the company's "litigation control group").
19. *Compare Orlowski v. Dominick's Finer Foods Inc.* 937 F. Supp. 723 (N.D. Id. 1996); *Valasses v. Samuelson*, 143 F.R.D. 118 (E.D. Mich. 1992); *Dubois v. Gradco Sys. Inc.*, 136 F.R.D. 341 (D. Conn. 1991) with *Armsey v. Medshores Mgmt. Serv. Inc.*, 184 F.R.D. 569 (W.D. Va. 1998); *Lang v. Reedy Creek Improvement Dist.*, 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 Assoc., Ltd.*, 59 P.3d 1237 (Nev. 2002), U.S.L.W. (BNA) 1411 (Jan. 14, 2003).
20. During that same period, the New York Court of Appeals showed varying degrees of solicitude for the attorney-client privilege. *Compare Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 524 N.Y.S.2d 508 (1989) with *Hopes v. Carota*, 74 N.Y.2d 716, 544 N.Y.S.2d 808 (1989).
21. *Upjohn*, 449 U.S. at 390.
22. See GEOFFREY C. HAZARD & W. WILLIAM 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.
23. For a cautionary tale on the importance of proper horse-shedding, see *Redwanly v. NYNEX Corp.*, 152 F.R.D. 460 (S.D.N.Y. 1993). See also C.E. Stewart, *Corporate Counsel and Attorney Work Product*, N.Y.L.J., Nov. 8, 1993.
24. JOHN K. VILLA, *CORPORATE COUNSEL GUIDELINES* § 3.23, 3-146 (2007). See also R. ZITRIN AND C. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 157-61 (1995).
25. 8 N.Y.3d 506, 836 N.Y.S.2d 527 (2007).
26. *Id.* at 509, 836 N.Y.S.2d 528.
27. *Id.*
28. *Id.* at 510, 836 N.Y.S.2d 528.
29. *Id.*
30. *Id.* at 510, 836 N.Y.S.2d 529.
31. *Id.*
32. *Id.*
33. *Id.* See 820 N.Y.S.2d 54 (1st Dep't 2006).
34. *Siebert*, 8 N.Y.3d at 512, 836 N.Y.S.2d at 530.
35. *Id.* at 511, 836 N.Y.S.2d at 530.
36. *Id.* at 512, 836 N.Y.S.2d at 530. See *Merrill v. City of New York*, No. 04 Civ. 1371 2005 WL 2923520, at *1 (S.D.N.Y. Nov. 4, 2005); *Wright v. Stern*, No. 01 Civ. 4437, 02 Civ. 4699, 2003 WL 23095571, at *1 (S.D.N.Y. December 20, 2003); ABA Comm. on Ethics and Prof'l Responsibility, *Formal Op.* 359 (1991).
37. See *supra* note 11 and accompanying text. See also *Kaiser v. Am. Tel. & Tel.*, No. Civ. 00-724, 2002 WL 1362054 (D. Ariz. 2002); *Camden v. Md.*, 910 F. Supp. 115 (D. Md. 1996); *Rentclub Inc. v. Transam. Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992); *Chancellor v. Boeing Co.*, 678 F. Supp. 250 (D. Kan. 1998). See generally Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739 (1997).
38. For such a dual representation to be kosher, it must be in accord with DR 5-105(c) (the "disinterested lawyer" test).
39. 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007). The *Arons* decision resolved a number of appeals from the lower courts of New York. See, e.g., *Kish v. Graham*, 40 A.D.3d 118, 833 N.Y.S.2d 313 (4th Dep't. 2007) (barring ex parte interviews with doctors of opposing party).
40. *Arons*, 9 N.Y.3d at 416, 850 N.Y.S.2d at 357.
41. *Id.*
42. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-91, 110 Stat. 1936, 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.)
43. *Arons*, 9 N.Y.3d at 409, 850 N.Y.S.2d at 351.
44. *Id.* at 410, 850 N.Y.S.2d at 352.
45. See David Harlow, *HealthBlawg*, <http://healthblawg.typepad.com/healthblawg/2007/11/hipaa-goes-dark.html> (quoting Eric Turkewitz, N.Y. Personal Injury Law Blog) (last visited April 12, 2008).
46. See also "Opinion Explains Which Corporate Insiders Can Be Contacted Without Counsel's Consent," AMERICAN BAR ASS'N, BUREAU OF NAT'L AFF., ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 270 (2007) (Wisconsin St. Bar Op. E-07-01); *Ohio Panel Embraces ABA's Revised Formula for Applying No-Contact Rule to Employees in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* 117 (2005) (Ohio Sup. Court Bd. Op. 20005-3). One area in which there is positive news is the increased recognition that there can be ex parte communications with putative class members prior to a judicial determination of class certification. See ABA Comm. on Ethics and Prof'l Responsibility, *Formal Op.* 445 (2007); see also *Philadelphia Bar Op.* 2006-6 (2006). But see *Dondore v. NGK Metals Corp.*, Nos. Civ.A. 00-1966, Civ.A. 00-2441, 2001 WL 516635, at *2 (E.D. Pa. 2001) (no pre-class certification contacts allowed). I have previously criticized the *Dondore* decision as being contrary to law and precedent. See C. E. Stewart, *Class Action Communications: Ex Parte or Not?* BNA CLASS ACTION LITIG. REP. 61 (2002).
47. 82 F. Supp. 2d 119 (S.D.N.Y. 1999).
48. *Id.* at 119.
49. *Id.* at 120–21.
50. *Id.* at 119–20. See ABA Comm. on Ethics and Prof'l Responsibility, *Formal Op.* 396 (1995); see also MODEL RULES OF PROF'L CONDUCT R. 5.3(c) 8.4(a) (2002). MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(1), DR 1-102(A)(4) and DR 1-104(D) (1983).

51. *Id.* at 123. See *Apple Corps Ltd., MPC v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998) (misrepresentations by attorneys and their agents where they were used in furtherance of "detect[ing] ongoing violations of the law are not ethically proscribed, especially where it would be difficult to discover the violations by other means").
52. *Gidatex*, 82 F. Supp. 2d at 126.
53. *Id.*
54. *Id.*
55. See, e.g., *Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (attorneys acting exactly as did the lawyers in *Gidatex* were found to have violated applicable professional ethics standards).
56. See, e.g., John K. Villa, *ACCA Docket* 58 (2000); A. Davis, *The Permissible Use of Deceptive Tactics*, N.Y.L.J., July 2, 2007.
57. See DR 1-102(A)(4). See also Davis, *supra* note 56 (the Committee's Opinion is flawed on numerous grounds, the most important of which is that it is expressly contrary to the maxim that "the ends do not justify the means.")

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