Solicitation By Defense Counsel: Ethical Pitfalls When Corporate Defense Counsel Offers Representation To Witnesses

By Barry R. Temkin and Michael H. Stone

Barry R. Temkin is a partner at Mound Cotton Wollan & Greengrass, Chair of the New York County Lawyers' Association Professional Ethics Committee and an Adjunct Professor at Fordham University School of Law. Michael Stone is an Adjunct Professor of Law at Benjamin Cardozo School of Law and Fordham Law School and former Managing Director and General Counsel to Morgan Stanley Dean Witter.

THE BAN on solicitation by attorneys in ABA Model Rule of Professional Conduct 7.3, and its state counterparts, has generally been used to prevent ambulance chasing by plaintiffs' attorneys. However, a 2010 New York decision has raised the possibility that a defense lawyer could be disciplined for solicitation when offering his services to a non-party witness employed by a corporate defendant, even when doing so for no additional fee. Justice Michael Ambrosio, in *Rivera v. Lutheran Medical Center*, referred a prominent national law firm to the Departmental Disciplinary Committee and disqualified the firm from representing several current and former employees of the law firm's client, a hospital.[1] The law firm had offered its services to several witnesses in a pending civil employment discrimination matter. The court found this to be solicitation in violation of the New York Code of Professional Responsibility, disqualified the firm, and referred it for disciplinary prosecution. The Appellate Division affirmed.

This decision has been criticized by members of the practicing bar, some of whom had assumed it was appropriate for corporate defense counsel to offer their services to current or former employees or non-party witnesses.[2] Moreover, the *Rivera* decision sets up a potential conflict with other principles of modern corporate

[1] Rivera v. Lutheran Medical Center, 22 Misc.3d 178, 866 N.Y.S.2d 520 (N.Y. Sup. Ct. 2008), affirmed 73 A.D.3d 891, 899 N.Y.S.2d 859 (N.Y. App. Div. 2010).

[2] C. Evan Stewart, *Just When Lawyers Thought It Was Safe to Go Back into The Water*, N.Y. SBA NY Business Law Journal, Winter 2011 at 24, available at http://www.zuckerman.com/media/site_files/99_NYBLJ_Just%20When%20Lawyers%20Thought%20it%20was%20Safe_EStewart_Winter2011.pdf (last visited August 8, 2013).

practice. For example, recent authorities have held that a corporation under some circumstances is obligated to furnish a free defense to a current or former corporate employee in the context of a criminal investigation.[3] While the KPMG decision, *U.S. v. Stein*,[4] addresses a corporation's duty to furnish counsel to a current or former employee in a criminal investigation, the question arises as to who exactly is supposed to be contacting that employee to offer the defense. In circumstances in which a corporation is legally obligated to offer a defense to a former or current employee, is a lawyer proscribed from making the phone call to offer her services?

The same issue may arise in an insurance situation when insurance coverage may be available to a former corporate employee charged with civil wrongdoing. The carrier appoints defense counsel to represent the corporate entity, and then instructs defense counsel to also represent a current or former employee of the company. Does *Rivera* prevent an attorney from making that call? And does it matter whether the services are offered in a phone call, letter or e-mail?

This article analyzes these questions by providing a brief overview of the relevant ethics rules and the decision of the New York Court of Appeals in *Niesig v. Team I*.[5]

I. The ABA Model Rules

By way of background, it is useful to review briefly the ethics rules governing solicitation and contact with represented parties. Some forms of attorney solicitation of prospective clients are banned in ABA Model Rule 7.3, which provides in pertinent part that:

> (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
>
> (1) is a lawyer; or
> (2) has a family, close personal, or prior professional relationship with the lawyer.

The New York formulation, in New York RPC 7.3, is similar:

> (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 or existing client…

ABA Model Rule 4.2, also known as the "no-contact" rule, bars an attorney from communicating with represented adverse parties. ABA Model Rule 4.2 provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The New York version is quite similar:

> In representing a client, a lawyer shall not communicate or cause another to

[3] U.S. v. Stein, 541 F.3d 130 (2d Cir. 2008).

[4] *Id.*

[5] 559 N.Y.S.2d 493 (1990).

> communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.[6]

The comments to ABA Model Rule 4.2 indicate that it is not intended to bar contact with all representatives of a represented organization, but is limited to employees in three general categories:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

The New York comment is similar.[7]

Significantly, the ban on solicitation in current Model Rule 7.3 and its New York counterpart primarily applies to in-person, telephonic and real-time electronic solicitation. The anti-solicitation rules do not apply to other forms of communication. Thus, a lawyer who simply sends a letter offering her services is engaging, generally speaking, in conduct protected by the First Amendment, and not impermissible solicitation.[8] An e-mail, similarly, would not be considered impermissible solicitation, provided it is not misleading and does not run afoul of other ethics rules.[9]

The Supreme Court has grappled for fifty years with the extent of constitutional protection afforded lawyer advertising. In *NAACP v. Button,* the Court held that states could not restrict the NAACP from soliciting potential plaintiffs for civil rights cases "in pursuit of the group's political expression or the exercise of associational freedom."[10] To do so was a violation of constitutionally protected activity.

In *Brotherhood of Railroad Trainmen v. State Bar,* a case similar in some respects to *Rivera*, a union reached out to its members offering to provide counsel in work-related litigation.[11] The Supreme Court held that its activities were not "ambulance chasing."[12] Subsequently in 1977, the Supreme Court in *Bates v. State Bar of Arizona* overturned the Arizona State Bar's suspension of two attorneys who merely advertised their rates for professional services to the public.[13] Although the Court rejected the State Bar's arguments

[6] NEW YORK RULES OF PROFESSIONAL CONDUCT 4.2 [hereinafter RPC], 22 NYCRR 1200.0, available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf. (last visited August 8, 2013).

[7] Available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm. (last visited August 8, 2013).

[8] *See, e.g.* Shapero v. Kentucky Bar Ass'n., 486 U.S. 466 (1988); *but see* Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995) (upholding 30 day ban on solicitation letter targeted to victims of mass disasters).

[9] NY Eth. Op. 899, 2011 WL 7784112 at para. 11 (NYSBA 2011) ("[o]rdinary email and web sites are not considered to be real-time and interactive communications.") (quoting from NEW YORK RULES OF PROFESSIONAL CONDUCT 7.3 cmt [9]).

[10] 371 U.S. 415, 442-444 (1963).

[11] 377 U.S. 1, 6 (1964).

[12] *Id.*

[13] 433 U.S. 350, 400 (1977).

in support of suspensions, it concluded that there "may be reasonable restrictions on the time, place, and manner of advertising."[14] It should be noted that the Supreme Court has held that the non-solicitation rule does not apply to written advertisements in most circumstances.[15]

II. The *Niesig* Case

The *Rivera* courts relied upon a 1990 New York decision *Niesig v. Team I*, which limited the scope of the "no-contact" rule to those employees "whose acts or omissions in the matter under inquiry are binding on the corporation … or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel."[16] *Niesig* addressed such limitations particularly as they apply to adverse counsel.

In *Niesig*, the plaintiff sued his employer following a workplace accident. Counsel for the plaintiff sought to interview employees at the company who witnessed the accident. The defendant corporation claimed that it was not proper for the plaintiff's attorney to interview the employees, claiming that they were "parties" for the purpose of the no-contact rule.[17] Citing "policy reasons," the court held that *ex parte* communications with non-managerial employees are permissible. The court held that the New York ethics rules only prohibit contact with employees who: (i) can bind a represented corporation in litigation; (ii) are charged with carrying out the advice of a corporation's attorney; or (iii) are considered organizational members "whose own interests are directly at stake in the representation."[18] The court sought to strike a balance between protecting parties from making "improvident settlements, ill-advised disclosures and unwarranted concessions," and encouraging informal discovery devices, such as *ex parte* interviews, which can streamline discovery and foster prompt resolution of claims.[19]

III. The *Rivera* Decision

Niesig addressed the restrictions on lawyers who are adverse to organizations. But what are the duties and obligations of defense counsel representing organizational defendants? May defense counsel offer legal representation free of charge to current and former corporate employees who become witnesses in investigations or pending litigation? Corporate lawyers who represent organizations in litigation or investigations often jointly represent individual employees or officers. The ethics rules permit such representation of multiple defendants particularly in civil actions.[20]

Nonetheless, the court in *Rivera v. Lutheran Medical Center* referred a prominent national law firm to the Departmental Disciplinary Committee and disqualified the firm from representing several current

[14] *Id.*

[15] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985); *Shapero*, 486 U.S. 466.

[16] Niesig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990).

[17] *Id.* at 368.

[18] *Id.* at 374-375.

[19] *Id.* at 370, 372.

[20] Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opinion 2004-02, available at http://www2.nycbar.org/Ethics/eth2004-2.html (last visited August 8, 2013).

and former employees of the law firm's corporate client.[21] In that case, the law firm represented a hospital defendant in an employment case seeking damages for retaliatory discharge.

In the course of discovery in the employment litigation, defense counsel identified seven witnesses, both current and former employees of the defendant hospital. However, the law firm refused to give its adversary home addresses for any of the witnesses, asserting that the firm was representing each of them.[22] The law firm then contacted all seven witnesses, offering to represent them at the defendant's expense. All of the prospective witnesses agreed to be represented by defense counsel.[23] While it is not clear from the decision, the court's analysis seems to imply that the attorneys contacted the witnesses by telephone.

Upon learning that all seven witnesses had "lawyered-up," the plaintiff petitioned the court to disqualify the defense firm, arguing that the firm had engaged in improper solicitation of clients in violation of the Lawyer's Code of Professional Responsibility. In addition, plaintiff's counsel successfully argued that the defense had done this specifically to circumvent and frustrate the right of plaintiff's lawyer to interview the witnesses informally, as permitted by the New York Court of Appeals in *Niesig v. Team I*.

The trial court agreed, finding that the law firm's offer of free representation to corporate employees and former employees that did not fall within the *Niesig* definition of "party" under the New York "no contact" rule constituted improper solicitation. Solicitation was defined by the New York Lawyer's Code of Professional Responsibility as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients … the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain."[24]

In finding that the law firm violated the Code of Professional Responsibility, the court wrote that the represented witnesses:

> were clearly solicited by [the law firm]on behalf of [hospital] LMC to gain a tactical advantage in this litigation by insulating them from any 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.[25]

As a result, the trial court disqualified the law firm from representing four of the seven witnesses and referred the firm to the Departmental Disciplinary Committee.[26] The Appellate Division, in a one-page decision, affirmed the trial court's order, concluding that "the record supports the Supreme Court's determination that [counsel] engaged in acts of solicitation of professional employment, in violation

[21] *Rivera*, 866 N.Y.S.2d at 520.

[22] *Id.* at 523-524.

[23] *Id.* at 524.

[24] *Id.* at 525, n. 3 (citing to NEW YORK DISCIPLINARY RULE 2-103(b) of the Lawyers Code of Professional Responsibility).

[25] *Id.* at 526.

[26] *Id.* at 527, n. 6.

of former Code of Professional Responsibility DR 2-103(A)(1) … .''[27]

IV. Implications of *Rivera*

Is *Rivera* a case of broad, sweeping implications for the corporate defense bar at large, or can it be limited to the underlying facts in the case? There is no explicit language in the *Rivera* opinions either below or in the Appellate Division that furnishes guidance as to whether either court intended to announce new legal principles or rather to limit the opinion to the facts of the case. Nor has research disclosed any public pronouncement by the Departmental Disciplinary Committee as to discipline or sanctions against defense counsel.

It certainly appears from the text of the opinions that the trial court was angered by defense counsel's conduct, which appeared to the court to constitute ''an end run'' around *Niesig*.[28] Indeed, the court wrote that defense counsel in *Rivera* had a ''history … of improperly thwarting plaintiff's attempts to obtain discovery.''[29] The argument could be made that the court's decision served as punishment for what it took to be the law firm's motivation to deprive opposing counsel of access to witnesses.

The court did not engage in extensive analysis of the solicitation issue. Under the former New York Code of Professional Responsibility, DR 2-103(A)(1) stated that ''a lawyer shall not engage in solicitation 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 or current client.''[30] Solicitation, as mentioned above, was defined as ''any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients … the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.''[31]

While the law firm's actions could be considered solicitation in some sense, it does not appear that the firm targeted these witnesses ''primarily for pecuniary gain'' within the meaning of DR 2-103(B). The firm was already engaged to represent the corporate defendant, and it is unlikely that significant additional fees would be involved in representing the seven witnesses in a pending case. In the event the witnesses were deposed, the firm would earn fees whether or not it represented the witnesses, as it would be obligated to represent the hospital at the deposition. It should be noted that the court cited no authority in support of its conclusion that the law firm's lawyers were motivated by financial gain in soliciting their new client. Moreover, the court did not explicitly analyze the nature of the communication, i.e., whether it was oral or written.

Effective April 1, 2009, New York adopted new Rules of Professional Conduct.[32] Disciplinary Rule 2-103(A) became New York Rule of Professional Conduct

[27] Rivera v. Lutheran Medical Center, 73 A.3d 891, 899 N.Y.S.2d 859 (2010). For some unknown reason, the law firm represented itself in the appeal.

[28] *Rivera*, 866 N.Y.S.2d at 526.

[29] *Id.*

[30] 22 N.Y. C.R.R. Section 1200.0 et seq.

[31] New York Disciplinary Rules 2-103(B).

[32] New York State Bar Association, *Resources on Professional Standards for Attorneys in New York*, available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm. (last visited August 8, 2013).

7.3(a) and retains identical language, as does the definition of solicitation under Rule 7.3(b). ABA Model Rule 7.3 is similarly worded, stating that "a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer." Comment 2 to ABA Model Rule 7.3, the "non-solicitation" rule which has succeeded DR 2-103, states that there is a potential for abuse in "direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services … the situation is fraught with the possibility of undue influence, intimidation and over-reaching."

Historically, the purpose behind the non-solicitation rule was to guard against "pressure on the potential client to hire the lawyer without adequate consideration"[33] In *Rivera*, the court itself stated that the witnesses at issue were not parties to the litigation "in any sense" and there was no chance they would be subject to any liability.[34] Thus, the policy reasons prohibiting solicitation—protection of parties that may be in a vulnerable state due to their *need* for legal services—are also not applicable. Moreover, the court's own reasoning suggests that the defense lawyers contacted the witnesses not for pecuniary gain, but to block their adversary's access to the witnesses.[35]

One New York trial court reached a more nuanced result in a 2012 case involving the alleged solicitation of current and former hospital employees. In *Dixon-Gales v. Brooklyn Hospital Center*,[36] Justice Marsha Steinhardt declined to disqualify the law firm representing the hospital from also representing two nurses, a nursing supervisor, and a respiratory therapist, all of whom were or had been employees of the hospital, as non-party deposition witnesses on the basis of the law firm's claimed improper solicitation of witnesses in violation of former Disciplinary Rule 2-103(A) (now Rule of Professional Conduct 7.3).

Distinguishing *Rivera* on its facts – particularly that court's finding that the witnesses in *Rivera* were clearly solicited to gain a tactical advantage by insulating them from any informal contact with plaintiff's counsel – the court in *Dixon-Gates* held not only that the hospital personnel all had requested to be represented at their depositions by the hospital's attorneys but also that their requests were consistent with the requirement of the hospital's self-insurance plan that it provide legal representation to its present and former employees with respect to malpractice allegations within the scope of their employment. In short, Justice Steinhardt found that the hospital had "established, based on its insurance protocol" as well as the possibility of the hospital's "vicarious liability" for the witnesses' conduct, "that it has not solicited witnesses in the context of [DR 2-103 (A)(1)]."[37]

[33] 22 NYCRR 1200.0, rule 7.3, *see supra* note 9.

[34] *Rivera*, 866 N.Y.S.2d at 526.

[35] *See* Muriel Siebert & Co., Inc. v. Intuit Inc., 8 N.Y.3d. 506 (2007).

[36] 35 Misc.3d 676, 941 N.Y.S.2d 468 (N.Y. Sup. Ct. 2012).

[37] *Id.* at 474.

V. Analysis and Conclusion

Rivera raises important questions. Foremost, will the standard proposed by *Rivera* be adopted in other jurisdictions? Should corporate defense counsel conduct themselves as if *Rivera* governs their conduct in ongoing investigations and litigations? Conversely, if defense counsel choose to distinguish or ignore *Rivera*, do they do so at their peril? Moreover, is *Rivera* limited to a situation in which a lawyer offers to represent a witness as well as a defendant, or can it be applied to a situation in which a lawyer represents multiple defendants? There may be a difference in circumstances between a lawyer's representation of the target of an investigation or a defendant, on the one hand, as contrasted with a witness in the case.

The court's analysis of former Disciplinary Rule 2-103 in the *Rivera* decision fails to discuss the primary focus of the Rule, which was to prevent lawyers from stirring up litigation and overbearing the will of unrepresented laymen. However, there is little such risk under the facts presented in most corporate litigation. Moreover, in the case of a lawyer's interview of a former employee, the lawyer will earn the same fee whether she interviews the witness as attorney for the corporation or as attorney for the witness, and there is little element of pecuniary gain, or at least not to the same extent as is present in a classic solicitation. In addition, the courts have been more lenient in permitting interviews of former employees of a corporate party.[38]

As a result of the decision in *Rivera,* corporate counsel may face risks in offering to represent current and former corporate employees, even if corporate policy is to provide such representation. What should corporate counsel do if the company's by-laws or other company policy require representation of its former officers, directors or employees? And what if the prospective witness qualifies as an additional insured on the company's insurance policy? Corporate counsel faces a dilemma—does counsel or a non-lawyer at the company comply with the by-laws and offer to provide counsel to the employee and thereby risk running afoul of the recent interpretation of Rule 7.3?

A lawyer wishing to avoid an ethical problem could suggest that the client or insurance carrier extend the offer directly, leaving the lawyer out of the mix. However, even that approach is not without risk, because, as C. Evan Stewart has pointed out in this context, "lawyers need to remember that they cannot direct others to do that which they are ethically proscribed from doing."[39] Nonetheless, if the offer of defense is on behalf of the client, not the lawyer, and the defense is pursuant to an established corporate policy or insurance policy, the client's offer should generally be considered permissible. As mentioned, the trial court in *Dixon-Gales v. Brooklyn Hospital* declined to disqualify counsel for a corporate defendant who offered services to witnesses based on established protocol.[40] On the other hand, a lawyer seeking to circumvent a court procedure or short-circuit the discovery process—as was the case in *Rivera*—may meet a chillier judicial reception.

[38] Muriel Siebert & Co., Inc. v. Intuit Inc., 8 N.Y.3d. 506 (2007) (No contact rule does not prevent interviews of former corporate employee, provided counsel avoids eliciting privileged information.).

[39] Stewart, *supra* note 2 at 25.

[40] *Dixon-Gales*, 941 N.Y.S.2d at 474.

Some lawyers might seek to address this issue by contacting an unrepresented witness as a witness and simply interviewing the witness for the relevant facts. At some point in most such interviews, the witness may ask the lawyer whether she requires representation. Assuming that this discussion is actually initiated by the witness, not the lawyer (and does not otherwise violate the Rules of Professional Conduct), it is unlikely to be considered solicitation. However, counsel should not use this approach if their ultimate goal is to be retained by the witness; courts have a way of seeing through subterfuge. Counsel should be careful to note that in the event of a subsequent dispute, a court may lend some credence to the client's recollection of events. Finally, counsel should consider carefully that the interests of the witness may conflict with the interest of the represented corporate client.

In conclusion, lawyers who represent corporate entities should be mindful of the implications of the *Rivera* decision. The solicitation ban in the ethics rules do not distinguish between conduct by plaintiffs' lawyers and defendants' lawyers, and defense counsel should be guided accordingly.