Communication with Represented Public Officials: The "No Contact Rule" as Applied to the Government Client

By Steven G. Leventhal

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States…. In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

The Declaration of Independence

Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, First Amendment

No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof…and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

N.Y. Constitution, Article I, § 9(1)

Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to communications of members of the public on public issues.

Minnesota St. Bd. for Comm. Colleges v. Knight[1]

The venerable notion that a lawyer should not directly communicate with the client of his or her adversary is deeply rooted in the American legal tradition. The current rule applicable in New York, Rule 4.2 of the New York Rules of Professional Conduct,[2] echoes earlier, similar prohibitions found in the Nation's first professional code of ethics for attorneys, the Alabama Code of Ethics of 1887, and in other state codes of ethics that followed Alabama's lead, and in the Canons of Professional Ethics adopted by the American Bar Association in 1908 and by the New York State Bar Association in 1909.

The purpose of the "No Contact Rule" is "to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches."[3] To accomplish this end, Rule 4.2 (Communication with Person Represented by Counsel)[4] provides that:

> (a) In representing a client, a lawyer shall not communicate or cause another to 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.
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> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Rule 4.2 does not prohibit communication with a represented party concerning matters outside the representation.[5] Unlike the analogous ABA Rule, the New York Rule prohibits communications with a represented "party." ABA Model Rule 4.2 was clarified in 1995 when the word "person" was substituted for "party." Report-

edly, this change was made at the request of prosecutors who were concerned that the broader rule might impede their investigative activities. New York did not make the same substitution in adopting Rule 4.2, possibly indicating that the New York Rule is limited to adversary proceedings. In 2007, the New York Court of Appeals affirmed that former employees are not parties for purposes of DR 7-104(A)(1).[6]

A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so. Communications authorized by law may include communications made on behalf of a client who is exercising a constitutional or other legal right to communicate with the government, or the investigative activities of lawyers representing government entities prior to the commencement of criminal or civil enforcement proceedings.[7]

The No Contact Rule applies only where the lawyer knows that the person is represented in the matter to be discussed, but the lawyer may not ignore the obvious; this knowledge may be inferred from the circumstances.[8] If the lawyer does not know that the person is represented in the matter to be discussed, the lawyer's communications with the person are subject to Rule 4.3 (Communicating with Unrepresented Persons).

Since a primary purpose of the No Contact Rule is to preserve the proper functioning of the attorney-client relationship, then, in the government context, we are once again faced with the familiar and sometimes vexing question, who is the client of a government lawyer? In her informative article on the erosion of the government attorney-client confidentiality, Professor Salkin noted that there are five possible clients of the government lawyer: the responsible official; the government agency; the branch of government (executive or legislative); the government as a whole; or the public.[9]

Rule 1.13 (Organization as Client) provides, in pertinent part, that:

> (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents….
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> (d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.13 Comment [9] indicates that the duties defined in that rule apply to governmental organizations, but that:

> Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules.… Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified….

As difficult as it may sometimes be to identify the client of a government lawyer, that identification may determine whether the communications between the attorney and the government officer or employee are confidential. Legal advice is privileged only when given to a client. Recent cases have eroded the government attorney-client privilege in federal grand jury investigations. The Federal Circuit Courts of Appeal have split, with the majority view being that:

> When an executive branch attorney is called before a…grand jury to give

> evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence.…
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> …[T]he proper allegiance of the government lawyer is contemplated by the public's interest in uncovering illegality among its elected and appointed officials.[10]

For now, the government attorney-client privilege is alive and well in the Second Circuit, which adopted the minority view that:

> [I]f anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.[11]

Having thus identified the client, and irrespective of whether particular communications with a government client are protected by the attorney-client privilege, a municipal attorney must still determine which of the government officers and employees are considered "parties" under Rule 4.2 and whether, on the facts presented, direct contact by adversary counsel with a represented party is "authorized by law."

In New York, the rights and responsibilities of corporations and corporate employees have served as a template for those of government entities, officers, and employees.[12] In 1990, the New York Court of Appeals held in *Niesig v. Team I*, a personal injury action, that plaintiff's counsel was permitted to conduct ex parte interviews of employees of the corporate defendant who were merely witnesses to the underlying accident.[13]

In an opinion written by Chief Judge Kaye, the *Niesig* Court traced DR 7-104(A)(1) of the Code of Professional Responsibility (the predecessor to Rule 4.2)[14] to the American Bar Association Canons of 1908, and noted that the rule fundamentally embodied principles of fairness. The general aim of the rule was to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralized the contact. By preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguarded against clients making improvident settlements, ill-advised disclosures and unwarranted concessions. In a concurring opinion, Judge Bellacosa noted that DR 7-104(A)(1) was not intended to protect a corporate party from the revelation of prejudicial facts.

The *Niesig* Court observed that often in litigation only the entity, not its employee, is the actual named party; on the other hand, corporations act solely through natural persons, and unless some employees are also considered parties, corporations are effectively read out of the rule. The issue therefore distilled to which corporate employees should be deemed parties for purposes of DR 7-104(A)(1), and that choice was one of policy.[15] The Court noted that a broader definition of "party," while furthering the interests of fairness to the corporation, would result in greater cost by foreclosing vital informal access to facts.

The *Niesig* Court rejected both a blanket ban and a "control group" test, and concluded that the test that best balanced the competing interests was one that defined "party" to include corporate 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 purposes of its liability, or employees implementing the advice of counsel. This definition of "party" as the term is used by DR 7-104(A)(1) served to negate the potential unfair advantage of extracting concessions and admissions from those who will bind the corporation. The Court concluded that all other employees could be interviewed informally.

Concern for the protection of the attorney-client privilege prompted the Court also to include in the definition of "party" the corporate employees responsible for actually effectuating the advice of counsel in the matter. However, in a concurring opinion, Judge Bellacosa noted that the confidentiality of attorney-client communications was unaffected by the case, and that the attorney-client privilege serves different purposes and policies.

In its practical application, the *Niesig* test would prohibit direct communication by adversary counsel "with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation." The test would permit direct access to all other employees, and specifically it would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued. The Court noted that a similar test is the one overwhelmingly adopted

by courts and bar associations throughout the country. This long practical experience persuaded the Court that, in day-to-day operation, the test was workable.

In his concurrence, Judge Bellacosa noted that an attorney representing an adverse party seeking to interview any corporate employee who has individually retained counsel would be bound by the prohibition of DR 7-104(A)(1).

Some commentators have criticized *Niesig* either for diminishing the attorney-client privilege, notwithstanding Judge Bellacosa's concurring opinion,[16] or for applying an unhelpful test for determining which corporate employees are parties for purposes of the No Contact Rule.[17]

In the period before *Niesig* was decided, the New York State Bar Association twice considered how the No Contact Rule might apply in the government setting, and the New York City Bar Association considered the question once. So too, in the period after *Niesig* was decided, the New York State Bar Association has twice considered the question, and the New York City Bar Association has considered the question once.

In 1970, the Ethics Committee of the New York State Bar Association considered whether DR 7-104(A)(1) permitted a lawyer to communicate with an adverse party who is a public officer or board member.[18] The Committee concluded that a governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual and that the attorney for a governmental unit and opposing counsel must abide by the provisions of DR 7-104. Therefore, once there is an indication that counsel has been designated by a party, whether a government unit or otherwise, with regard to a particular matter, all communication concerning that matter must thereafter be made with the designated counsel, except as provided by law.

In 1975, the Committee considered whether an attorney representing a petitioner reviewing a split decision of the Board of Education may contact the minority members of the board in connection with such proceedings without the consent of the board's attorney.[19] The Committee found that DR 7-104(A)(1) did not prohibit an attorney from interviewing employees or witnesses of an adverse party, as long as such witnesses were not, in fact, adverse parties in the action. It reasoned that the overriding public interest compels that an opportunity be afforded to the public and its authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. The Committee opined that minority members of a public body should not, for purposes of DR 7-104(A)(1), be considered adverse parties to their constituents whom they were selected to represent.

In 1988, the Ethics Committee of the New York City Bar Association considered an inquiry from an attorney representing a client who had a dispute with a government agency.[20] The agency had retained private counsel for the matter. The inquiring attorney requested the opportunity to submit comments to the head of the agency regarding the agency's exercise of its authority in the matter. The government's private counsel advised the inquiring attorney that a staff attorney for the government agency objected to the request, and took the position that such a communication would constitute an ethical violation by the inquiring attorney. The Committee balanced the competing interests of providing the government with the same protections that were afforded to other parties with the need to ensure relatively unrestricted public access to government. It opined that the inquiring attorney must first determine whether the head of the agency was acting in an official capacity. If so, then pursuant to the "authorized by law" exception DR 7-104, the attorney was permitted to submit comments to the head of the agency concerning the subject matter of the representation, provided that he notified the government's private counsel of the intended communication and that he provided counsel with copies of the submissions. However, if the inquiring attorney concluded that the head of the agency was acting in a private capacity, then he was not permitted to communicate with that person, unless he had the consent of opposing counsel or was authorized by law to do so.

In its first post-*Niesig* opinion addressing the application of the No Contact Rule in the government setting, the Ethics Committee of the New York State Bar Association considered whether an attorney may communicate directly with officials or employees of a government entity that is represented by counsel. The Committee noted that, in New York, the governing principle is set forth in the *Niesig* decision, which "define[d] 'party' to include corporate 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. All other employees may be interviewed informally." The Committee concluded that an attorney may communicate with officials or employees of a governmental entity that is represented by counsel in connection with a matter provided: (a) the officials or employees lack the power to bind the entity; (b) the communication is directed to an attorney representing the entity in connection with the subject matter of the communication; or (c) the attorney concludes that he or she is authorized by law to make the communication.

In 1991, the Ethics Committee of the New York City Bar Association considered an inquiry from an attorney that represented a former prison employee challenging

his discharge from the position of prison guard.[21] The inquirer wished to interview various government employees outside of the presence of, and without notice to, the agency's counsel. The Committee concluded that the inquirer was permitted to interview guards who were merely witness to the incident, outside the presence of and without notice to the agency's counsel, so long as the inquirer clearly identified himself and his interest to the persons being interviewed. As to agency supervisory officials whose acts or omissions may be imputed to the agency for purposes of liability, the Committee concluded that the inquirer was not permitted to interview such persons outside the presence of and without notice to the agency's counsel. As to those officials who had the authority to settle the dispute, the Committee concluded that the Rule, as construed in a manner consistent with the logic of *Niesig*, would generally prohibit the inquirer from communicating with such officials outside of the presence of the agency's counsel; however, certain communications with high-level agency officials relating to "the subject of the representation" may be ethically permitted as authorized by the legal and constitutional rights of the lawyer and his or her client to petition or otherwise have access to the government.

The Ethics Committee of the New York State Bar Association revisited the question in 2007.[22] The Committee was asked whether, over the objection of counsel representing a town planning board, the in-house counsel for a real estate development company may communicate privately, separately, and informally about the developer's pending application with the individual members of the board who support the developer's proposed project. The controversial project, construction of a shopping center, was supported by members of the Town Board but opposed by a majority of the members of the planning board.

The planning board was represented with respect to the shopping center project by outside counsel. The developer also retained outside counsel to "formally" represent the developer before the planning board, limiting in-house counsel's role to communicating "separately and informally" on behalf of the developer with the "more receptive" minority of planning board members who supported the project. The inquirer stated that these communications were not in the nature of legal advice or assistance and were not designed to supplant guidance provided to the board by their own legal counsel. Rather, the separate communications were confined to the provision and receipt of factual information and the discussion of state and local environmental and land use issues and polices and were intended "to ensure that supportive members of the planning board had the information they needed to counter the opposition's efforts to derail the project, and were able to share facts and strategies with the developer." The developer thus sought to create an even playing field with members of the public who opposed the project and who "communicate and strategize freely with like-minded members of the planning board, without going through the board's legal counsel." Counsel for the planning board objected to the separate, private communications regarding the project with individual members of the planning board, and directed that the developer's counsel limit his communications to written submissions addressed to the planning board secretary for distribution to the entire board and for inclusion in the administrative record.

The Committee applied a two-step analysis to determine whether direct contact by the developer's counsel with minority members of the planning board was permitted under DR 7-104(A)(1). The Committee first analyzed whether the minority planning board members were "parties" within the meaning of the *Niesig* decision and, upon concluding that they were (because the planning board was invested with the power to issue binding SEQRA, site plan and subdivision determinations with respect to the matter before it), the Committee next determined whether the proposed communications were "authorized by law."

The Committee noted that most authorities share the sentiment that "the literal application of the 'no-contact' rule must be tempered by constitutional considerations where the First Amendment right to petition government is implicated." The Committee adopted the approach of the American Bar Association Standing Committee on Ethics and Professional Responsibility in ABA 97-408 that allowed, without consent, contacts with government officials that would otherwise have been prohibited by the model No Contact Rule, subject to three conditions: (a) the official to be contacted must have authority to take or recommend action in the controversy, (b) the sole purpose of the communication must be to address a policy issue, and (c) advance notice of the proposed communications must be given to the lawyer representing the government official in the matter so as to afford government counsel the opportunity to advise his or her client with respect to the communication, including whether even to entertain it.

The Committee concluded that the communications fell within the protection of the First Amendment right to petition and were therefore not prohibited by DR 7-104(A)(1), provided that counsel for the planning board was given reasonable advance notice that such communications will occur. Noting that the precise parameters of the constitutional right to petition were beyond its jurisdiction, the Committee noted that communications directed to government officials who do

not have the authority to take or recommend action in the matter, or communications that are intended to secure factual information relevant to a claim (such as interviews with witnesses to government misconduct), should be fully subject to the No Contact Rule as, in each of these situations, there are no First Amendment considerations at play. Of course the communications, even if not protected by the First Amendment right to petition, would be permissible under the No Contact Rule if the respective government officials are not "parties" as the term was defined in *Niesig*.

The Committee concluded its analysis with several important caveats. First, it did not opine on whether additional "private," "separate" or "informal" communications with board members might violate a state statute or local ordinance that governs planning board procedures, or whether such communications may implicate a locally adopted ethics code. Second, it did not address ex parte communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations. Third, the Committee cautioned that the inquirer may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product. Fourth, the Committee stated that the inquirer should cease contact with a planning board member if the member so requests.

Effective April 1, 2009 the New York Appellate Divisions jointly adopted the New York Rules of Professional Conduct (22 NYCRR Part 1200) making New York the last state to adopt the Model Rules of Professional Conduct; this now allows us to look to judicial decisions and ethics opinions rendered in other jurisdictions for guidance in interpreting the New York Rules of Professional Conduct. As noted by the Ethics Committee of the New York State Bar Association, the majority view is that the No Contact Rule is limited in the government setting by application of the right to petition government guaranteed by the Constitutions of the United States and the State of New York.

In his comprehensive treatise on New York Rules of Professional Conduct, Professor Simon gives the following advice to New York lawyers interpreting the No Contact Rule:[23]

> First, the interpretation of the no-contact rule remains very much a state by state affair. Even though the text of the rule is likely to be almost identical from one state to the next, the interpretation of the rule differs greatly. For litigators in particular, it is crucial to research the meaning of the no-contact rule in each jurisdiction where litigation is pending.
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> Second, the meaning and operation of the no-contact rule varies from context to context. An interpretation that works in the context of a class action may not work in the context of a suit against a state agency or a visit to a web site.
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> Third, the meaning of the no-contact rule is evolving over time. Courts and ethics committees are producing a steady stream of opinions interpreting the rule, and it is important to check the latest offerings before engaging in ex parte communications with those who may be within the sweep of the no-contact rule.
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> Fourth, opposing attorneys are eager to seek sanctions for violations of the no-contact rule, including suppression of evidence, disqualification, and monetary sanctions-and courts are often willing to oblige if they find a violation.
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> In sum, it pays to pay attention to the nuances and frequent developments in the scope and meaning of the no-contact rule. Lawyers who fail to do so are taking great professional risks.

There are very few cases construing the "right to petition" clause of the First Amendment. However, while the First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances, and while the government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy or by imposing sanctions for the expression of particular views it opposes, the First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective…[Nor does it] impose any affirmative obligation on the government to listen…[or] to respond…."[24]

It is not uncommon for litigation adversaries or their counsel to confront government officials at their public meetings. The Open Meetings Law[25] is silent on the issue of public participation. Thus, a government body is not required to permit members of the public to speak or participate at meetings; if a body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, it is not obligated to do so. But, if a government body chooses to permit public participation, it must do so in a reasonable manner, based on reasonable rules that treat all members of the public equally.[26]

If the public is generally permitted to speak at meetings, a public body cannot validly prohibit a person from speaking because of the possibility that he or she might at some point initiate litigation, as that person's comments would divulge nothing about the public body's strategy in the potential or eventual litigation.[27]

In summary, under Rule 4.2 (Communication with Person Represented by Counsel), an attorney may communicate directly with officers or employees of a government entity provided that either: (a) they are not "parties" as defined by the Court of Appeals in *Niesig*; (b) the contacted officer or employee is an attorney representing the entity in connection with the subject matter of the communication; or (c) the contacting attorney is authorized by law to make the communication, such as a communication on a policy issue made on behalf of a client who is exercising a constitutional or other legal right to communicate with the government, upon reasonable advance notice to counsel. Municipal attorneys should fully inform their clients of the dangers that attend unguarded conversations with litigation adversaries, and should urge them to exercise caution and restraint in responding to direct communications from adversary counsel.

Endnotes

1. 465 U.S. 271, 272 (1984).
2. N.Y. COMP. CODE OF R. & REGS. TIT. 22 § 1200.0 (2012).
3. N.Y. State 652 (1993); N.Y. State 650 (1993); N.Y. State 607 (1990).
4. Unless otherwise stated, all "Rules" cited in this outline are found in the New York Rules of Professional Conduct, N.Y. COMP. CODE OF R. & REGS. TIT. 22 § 1200., effective April 1, 2009.
5. Rule 4.2 Comment [4]. The Appellate Divisions have not adopted the Comments, which are published by the New York State Bar Association to provide guidance for attorneys in complying with the Rules.
6. Muriel Siebert Co. v. Intuit, Inc., 8 N.Y.3d 506 (2007).
7. Rule 4.2 Comment [5].
8. Rule 4.2 Comment [8].
9. Patricia Salkin, *Beware: What You Say to Your [Government] Lawyer May be Held Against You—The Erosion of the Government Attorney-Client Confidentiality*, 35 URB. LAW 283 (2003). *See also,* Fed. Ethical Consideration 5-1 of Canon 5 of the ABA Code of Prof. Resp. (1973) (the immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency).
10. In re Lindsay, 158 F.3d 1263 (D.C. Cir. 1998).
11. In re Grand Jury Investigation v. John Doe, 399 F.3d 527 (2d Cir. 2005).
12. *See* New York State Bar Association, Opinion 160 (October 9, 1970).
13. Niesig v. Team I et al., 76 N.Y.2d 363 (1990).
14. DR 7-104(A)(1) provided that "[d]uring the course of representation of a client a lawyer shall not…[c]ommunicate or cause another to communicate 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 to do so."
15. "In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State, [the Court is] of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules of professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law. That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of nonlawyers. In such instances…[the Court is] not constrained to read the rules literally or effectuate the intent of the drafters, but to look to the rules as guidelines to be applied with due regard for the broad range of interests at stake. When [the Court agrees] that the Code applies in an equitable manner to a matter before [it, the Court] should not hesitate to enforce it with vigor. When [the Court] find[s] an area of uncertainty, however, [it] must use [its] judicial process to make [its] own decision in the interests of justice to all concerned." Niesig, 76 N.Y.2d at 369-70 (citations omitted).
16. *See* C. Evan Stewart, *How One Bad Ruling Can Spoil a Whole Bunch of Cases,* N.Y. L.J., Jan. 8, 2009, at 5, col. 2.
17. *Id. See also,* Brian C. Noonan, *The Niesig and NLRA Union: A Revised Standard for Identifying High-level Employees for Ex Parte Interviews,* 54 N.Y. L. Sch. L. Rev. 261 (2009/2010).
18. New York State Bar Association, Opinion #160 (1970).
19. New York State Bar Association, Opinion #404 (1975).
20. NYC Bar Association, Formal Opinion 1988-8 (1988).
21. NYC Bar Association, Formal Opinion 1991-4 (1991).
22. New York State Bar Association, Opinion #812 (2007).
23. ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 833 (2012 Ed.).
24. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464-65 (1979) (internal citations omitted).
25. N.Y. PUB. OFFICERS LAW Art. 7.
26. *See* Comm. on Open Gov't OML-AO-4810, 4691, 4644, 4573, 4044, 4024, 3845, 3518, 3405, 3364, 3295, 3171, 2896, 2894, 2798, 2794, 2696, 2585, 2199 (Opinions of the Committee on Open Government are available at http://www.dos.ny.gov/coog/index.html.).
27. Comm. on Open Gov't OML-AO-2696.

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