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# Ethics Corner:

## The *Rivera* Precedent: What You Don't Know Can Hurt You

By C. Evan Stewart

Assume the following hypothetical:

> *A prominent, international law firm is retained by a corporation to defend a sexual/employment discrimination claim. Shortly thereafter, the law firm contacts current and former employees who have direct, first-hand knowledge of the facts. Assuring these individuals that the law firm sees no conflict of interest between them and the corporation, the law firm offers to represent the individuals at the corporation's expense. Not surprisingly, the individuals happily agree to be represented by the law firm. In the early stages of discovery, the plaintiff's counsel discovers this multi-representation arrangement and moves to disqualify the law firm for purported ethical violations.*

What should the outcome be? Prior to 2008, I would have thought the answer would be obvious and unequivocal: the motion is unfounded and thus would be denied. Even today, I believe that should still be the answer. But there is one roadblock standing in my way.

Based upon the exact same "hypothetical" set forth above, a Kings County Supreme Court (New York) judge found in 2008 that a law firm had violated the "non-solicitation" rule (which today is Rule 7.3). 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."

By its explicit rationale (see Comment 1 to ABA Model Rule 7.3), this rule has no application to the "hypothetical" outlined above; it is, rather, expressly designed to prohibit ghoulish ambulance chasing. So why did the judge use this rule as a hook to punish the law firm in question? He found the answer in the New York Court of Appeals' ruling *Neisig v. Team I*, 76 N.Y.2d 363 (1991), which permitted plaintiff's counsel to engage in ex parte communications with non-alter ego employees of the defendant company:

> [The employees] were clearly solicited by [the law firm] on behalf of [the corporation] 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.

Two years later, the Appellate Division Second Department affirmed the trial judge in a terse opinion: "the record supports the Supreme Court's determination" that the law firm violated the non-solicitation rule. *Rivera v. Lutheran Medical Center*, 899 N.Y.S.2d 859 (2d Dept. 2010), *aff'g*, 866 N.Y.S.2d 520 (Sup. Ct. Kings Co. 2008). Since that affirmance, none of the other Appellate Divisions has weighed in on this subject; nor has the Court of Appeals offered its view(s).

I have previously opined that the *Rivera* decision is dead wrong (see e.g., *New York Law Journal* (Jan. 8, 2009)), but have never found a reasoned way around this unfortunate precedent. In 2014, the New York County Lawyers' Association Professional Ethics Committee issued Formal Opinion 747, which attempted to do so. This group opined that if the lawyers/law firm *first* approach an employee/ex-employee with the mindset only to interview that individual and *thereafter* offer representation, then the *Rivera* precedent would not be applicable. Unfortunately, that "solution" does not really work because it merely delays the "problem" that concerned the trial court in *Rivera* by a few minutes; the "tactical advantage" that the court found so problematic – the blocking of ex parte communications with individuals – would of course still occur (see *NY Business Law Journal* (Winter 2014)).

When my students at Fordham Law School discussed *Rivera* recently, one of them asked me why plaintiffs' lawyers had not made more use of *Rivera* to challenge law firms' multiple representation arrangements (after I had told them that most lawyers have continued on, as before, offering

such arrangements to individuals). It is a good question. The only answer I could come up with is that since *Rivera* is so clearly wrong, plaintiffs' lawyers may well be fearful of judges in courts outside the Second Department writing scathing rebukes to *Rivera* and teeing up the matter for the New York Court of Appeals. Hopefully, that day is coming soon; either that or an amendment to the "non-solicitation" rule. But until either/or, New York lawyers need to drive slowly and have their seatbelts on vis-à-vis the big potholes created by the truly extraordinary *Rivera* decision.

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