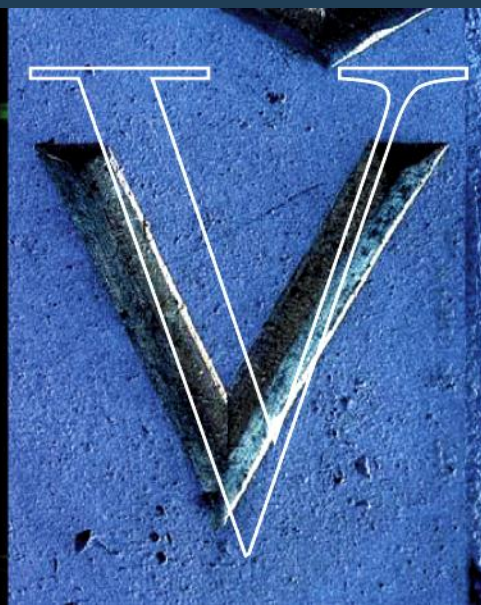
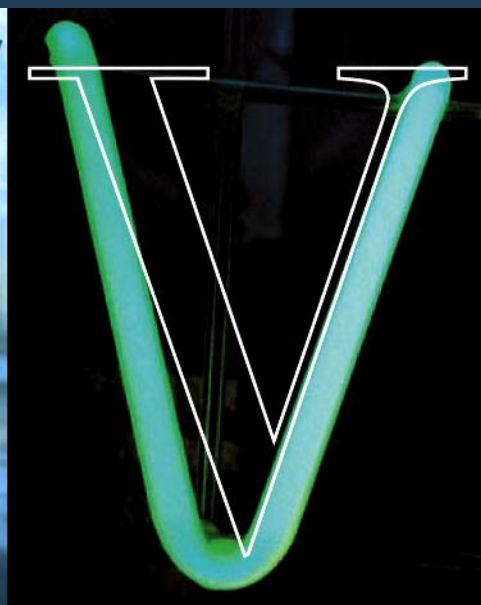
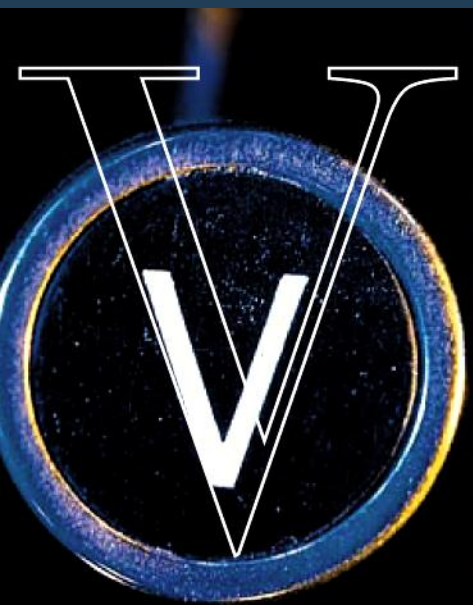


CLE Presentation:  
*EX PARTE* COMMUNICATIONS WITH AN ADVERSARY'S  
EMPLOYEES AND FORMER EMPLOYEES

Presentation by Matthew T. McLaughlin and Joann E. Walker  
September 25, 2013



*This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of New York in the amount of 1.0 credit hours, of which 1.0 credit hours can be applied toward the Ethics requirement. Venable certifies this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of New York, which govern minimum continuing legal education. Venable is a State Bar of New York approved MCLE provider. This program is appropriate for both experienced and newly admitted attorneys.*



# *Ex Parte* Communications with Former Employees





# Setting the Stage

Beyonce is on The Mrs. Carter Show World Tour in Orlando, Florida. She is preparing to sing All the Single Ladies. As she makes her entrance down some steps, she trips and falls. Beyonce believes that her heels caused the fall. She recalls the sensation of her left ankle collapsing just before tumbling. Though Beyonce completed the concert, she was later diagnosed with broken first and fifth metatarsal bones in her left foot. Major surgery followed and Beyonce lost significant business and performance opportunities.

After speaking with Shawn Carter, Beyonce sues What's On Your Feet? My Shoes, Inc. alleging WOYFMS's heels were negligently manufactured. After filing suit, and without notice to WOYFMS, Beyonce's counsel contacted WOYFMS's retired Chief Shoe Designer, Jimmy Choo, and asked him questions about the design and manufacturing of the heels. Is such *ex parte* communication ethically permissible?

<http://www.youtube.com/watch?v=FSSGYwzix4U>



# New York Professional Code of Conduct Rule 4.2

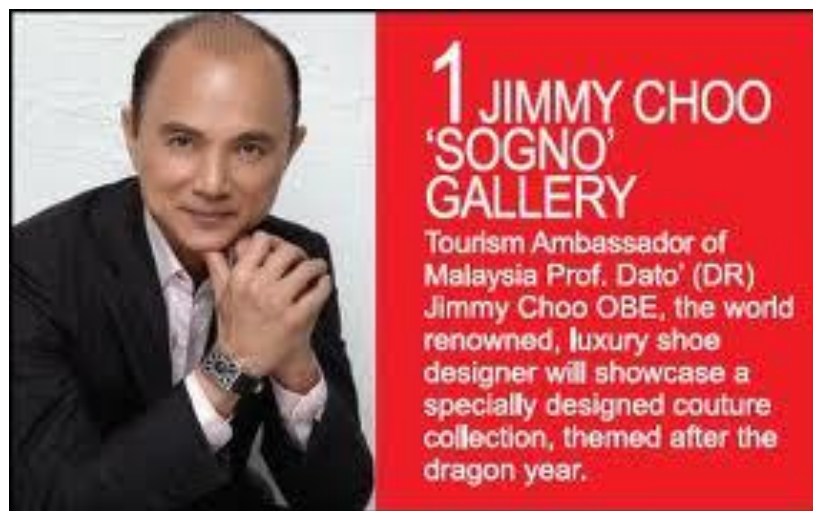
## **Communication With Person Represented By Counsel**

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.

**The Twist: The Rule pivots on the word “party”.**



# Is a former employee considered a “party” under the New York Professional Code of Conduct Rule 4.2?



## ***Niesig v. Team*, 559 N.Y.S.2d 493 (1990)**

Facts: Plaintiff was injured in a scaffolding collapse at a construction site. His counsel sought court permission to informally conduct *ex parte* interviews of all the defendant's employees who had witnessed the accident. Some employees were former employees by the time of plaintiff's application for the *ex parte* interviews.

Appellate Division: Ethical Rule 4.2 banned contact with all present employees.

Court of Appeals: Agreed with Appellate Division holding that former employees could be contacted, and established a broad three-prong rule governing when present employees are considered parties under Rule 4.2 and may be contacted.



# Niesig Test

The test that properly balances the competing interests defines the word “party” under the no-contact rule to include the following three categories of employees:

1. Corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (i.e., the corporation’s alter egos: managers, directors, officers)
2. Corporate employees whose acts or omissions in the matter under inquiry are ... imputed to the corporation for purposes of liability
3. Employees implementing the advice of counsel

Opposing counsel cannot contact people within these three categories. All employees not in these categories may be interviewed informally and without notice to counsel.





# *Muriel Siebert & Co., Inc. v. Intuit, Inc.*, 836 N.Y.S.2d 527 (2007)

- Plaintiff sued defendant for failing to promote an internet brokerage contract. Plaintiff's COO, Nicholas Dermigny, was heavily involved in the events leading to the lawsuit and was part of plaintiff's "litigation team" when the lawsuit began. During the litigation, Dermigny was terminated and he refused to be represented by plaintiff's counsel when defendant sought to take his deposition.
- Before Dermigny's scheduled deposition, defendant's counsel contacted him without plaintiff's knowledge and arranged for an interview. Before beginning the interview, defense counsel advised Dermigny that he should not disclose any privileged or confidential information, including any conversations with plaintiff's counsel or information concerning plaintiff's legal strategy. The interview proceeded and Dermigny did not disclose any privileged information.
- Learning of the interview, plaintiff's counsel moved to disqualify defense counsel, enjoin it from using any information provided by Dermigny during the interview, and stay the upcoming deposition.



# Siebert Holding

- Reviewing the changes brought by *Niesig*, the Court of Appeals noted that the *Niesig* decision attempted to strike a balance between protecting represented parties from making improper disclosures and allowing opposing counsel to learn relevant facts through informal devices like *ex parte* interviews. *Niesig* stands strong after nearly two decades.
- The Court held that there was no basis for the disqualification because Dermigny no longer had authority to bind the company in litigation, was no longer charged with carrying out the advice of counsel, and did not have a stake in representation.
- In addition, the court noted that the defendant's counsel properly advised Dermigny of its representation and interest in the litigation, and directed Dermigny not to disclose privileged or confidential information.



*Merrill v. The City of New York*, No. 04  
Civ.1371, 2005 WL 2923520  
(S.D.N.Y. Nov. 4, 2005)

Facts: Plaintiff sought to interview a former New York City police officer who had patrolled a demonstration where plaintiff was arrested. Defendants' counsel opposed plaintiff's requests to contact the former officer.

Holding: The court held that the Plaintiff's counsel could contact the former police officer for two reasons. First, as a beat-cop, the witness officer was not in a position to bind the City. Second, and more compelling, the officer was a former employee, further removing him from the reach of the ban.



So what does *Niesig* and its progeny mean to the practicing lawyer?



**“So what?”**



# Core Lessons from *Niesig* and Progeny

After identifying a *Niesig*-suitable target witness:

- Counsel should identify herself as representing an interested party in the matter when approaching the potential witness.
- Counsel should advise the witness whom she is hoping to interview that he is free to decline.
- Counsel should advise the employee or former employee not to disclose any privileged or confidential information.
- Counsel should caution the witness that if during the interview, he is asked a question that could potentially lead to the disclosure of privileged or confidential information, he should so advise counsel and decline to answer the question.



# *Ex Parte* Communications with Non-Managerial Employees





# Setting the Stage

It is December 6, 1969 and the Rolling Stones are set to take the stage at the Altamont Speedway Free Festival. In a classic display of good judgment, the Stones hire the Hells Angels as security for the event. During a light ditty known as “Sympathy for the Devil,” a fight erupts in the crowd before the stage. The Stones pause briefly. The Hells Angels restore the bonds of harmony and the Stones continue into “Under My Thumb”.

The shindy resumes and a pack of Hells Angels scuffles with a concert goer named Meredith Hunter. One of the Angels grabs Hunter’s head, punches him, and chases him back into the crowd. Hunter withdraws and returns to the brawl with a revolver drawn. In the melee, a Hells Angel brutally stabs Hunter three times. Hunter dies as the Stones callously thud into Gimme Shelter.



Hunter's estate brings a wrongful death action against the Rolling Stones and their concert promoter. The estate's counsel wants to conduct an *ex parte* interview with Kerry Longford, an assistant lighting technician employed full time by the Stones. Is this ethically permissible?

<http://www.youtube.com/watch?v=Dt0ipUCfdIU>





# *Niesig* Test

Remember the three-part test:

1. Can Lighting Assistant Longford legally bind the Rolling Stones?
2. Can Longford's conduct in the matter under inquiry be imputed to the corporation for the purpose of liability?
3. Is Longford charged with implementing advice of counsel?



# Social Media and the No Contact Rule



# Setting the Stage

Paul McCartney files for divorce from Heather Mills. To bolster the case that Ms. Mills had a seedy past that included drug use and providing escort services, McCartney's attorney wants to access Ms. Mills' Facebook page for additional information. Is this permissible?

McCartney's attorney also wants to "friend" Ms. Mills on Facebook. Is this permissible?



## N.Y. Professional Ethics Opinion 843

- The Committee concluded that an attorney representing a party in pending litigation may access the *public* pages of another party's social networking website to obtain publicly available information about that party.
- The Committee noted that some social networking websites and/or users do not require pre-approval or consent from the party to access member profiles, and thus the profiles are accessible to all members.



# Social Media and the No Contact Rule

- An attorney cannot “friend” or otherwise make contact with the party. Such conduct would fall within the prohibitions of Rule 4.2.
- An attorney cannot employ a third party to “friend” the party. Such conduct would fall under Rule 8.4 (c), which prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation”; Rule 4.1, which prohibits lawyers from making false statements of fact or law to a third person; and Rule 5.3(b)(1), which holds an attorney responsible for the conduct of employed non-attorneys who violates the rules.
- Likewise, the lawyer may not himself join the network using any name of deception to conceal his identity.



# QUIZ

1. What band sings the following song?
2. What is the name of the song?
3. What is the name of the album the song is found on?

Bonus: What year did the album come out?



