Application of the "No Contact Rule" to Municipal Land Use Boards

By Adam L. Wekstein

Introduction

Under New York State ethical rules and, for that matter, throughout the country,[1] a lawyer's ability to contact another party regarding a matter in which that party is represented by counsel is quite circumscribed. The so-called "No Contact Rule" is embodied in New York by Disciplinary Rule 7-104(A)(1),[2] which reads as follows:

> A. During the course of the representation of a client a lawyer shall not:
>
> (1) communicate or cause another to communicate on the subject of the representation 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 by law to do so.

DR 7-104(A)(1) applies to both litigated and non-litigated matters.

Application of the No Contact Rule to attorney communications with a local land use board or members thereof, when such boards are typically represented by counsel, can be problematic both for attorneys representing applicants for development approvals and those representing a board. Little ethical guidance has emerged from the courts or ethics committees in New York State as to the contours of the No Contact Rules vis-à-vis planning boards, zoning boards of appeals and municipal legislative bodies. Uncertainty exists because while application of the No Contact Rule is somewhat straightforward to matters involving parties who are natural persons and a little less so when it comes to corporate entities, it is far more complicated when the party that is putatively represented by counsel is a board, commission, official or employee of the government. Among other things, the complications arise because the ability of an attorney to communicate on behalf of his client with the government regarding a proposed development or zoning proposal is certainly encompassed within and protected by the fundamental right of citizens under the First Amendment to the United States Constitution to petition the government.[3] A developer is not stripped of such constitutional rights merely because he or she has hired a lawyer to advance his or her interests.

Although it would perhaps be simplest to vindicate First Amendment rights by employing a rule which allows attorneys free and unfettered access to municipal officials,[4] New York does not adhere to such an approach. Rather the State effectively balances such rights and the need for access to the government against the purposes to be served by the No Contact Rule.[5] The balancing is accomplished through application of the plain terms of DR 7-104(A)(1) with the understanding that an attorney may be "authorized by law" to communicate with a public official or board pursuant to the First Amendment.

Ethics Opinion 812 (5/3/07) ("Opinion 812"), issued last year by the New York State Bar Association Committee on Professional Ethics (the "Committee"), provides much needed, although necessarily incomplete, guidance regarding the weighing of the competing ethical and constitutional interests in the context of communications by a developer's attorney with individual members of a municipal planning board. It did not involve a matter in litigation, but rather, normal communications during the course of the land use review process.

Purpose and General Application of the No Contact Rule

The Court of Appeals has indicated that the No Contact Rule is designed to embody principles of fundamental fairness. It has stated that the Rule's purpose is:

> to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact. . . . By preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.[6]

The ethical considerations, which are part of New York's Code of Professional Responsibility, reinforce the theoretical basis for the rule by stating that "the legal system functions best when persons in need of legal advice or assistance are represented by their own counsel."[7]

On its face, regardless of the nature of the parties, the No Contact Rule requires inquiry into: (1) whether the individual with whom an attorney wishes to communicate is a "party" to a matter; (2) whether the party is represented by counsel; (3) whether the matter about which the attorney wants to communicate is the subject of such representation; and (4) (if the answers to items (1), (2) and (3) are in the affirmative), does any law authorize the attorney to contact the unrepresented party?

The first question, whether a person is a party in a matter, comes into play when the individual with whom the attorney wants to communicate is associated in some fashion with a corporation, other entity, or governmental agency that is a party.[8] *Niesig* delineates those employees, officials or representatives of a corporation who are considered to be the party for the purposes of DR-7-104(A)(1) in the following passage:

> The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines "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"), are imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.[9]

Niesig makes clear that the standard is formulated in this manner to eliminate the unfair advantage that would result from the extraction of concessions and admissions which would bind the corporation, by prohibiting counsel from communicating with employees who have "speaking authority" for the corporation or who are "so closely identified with the interests of the corporate party as to be indistinguishable from it."[10]

Niesig explains the correct employment of its test as follows:

> [i]n practical application, the test we adopt thus 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' . . . This test would permit direct access to all other employees, and specifically—as in the present case—it would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued.[11]

Application of the No Contact Rule to the Government

Niesig's test applies with equal vigor to governmental entities.[12] Accordingly, under the rule, if the employee or official of a governmental agency does not have the power to bind that agency, his or her actions cannot be imputed to the agency for the purposes of liability and he or she is not implementing advice of counsel, then the employee is not a party and the restraints of the No Contact Rule do not apply.

As such, a governmental employee whose only role in a matter is as a witness to salient events would not be a party.[13] A leading treatise on New York law discusses the issue as follows:

> adverse counsel's informal contact with agency employees who do not have management status is not contrary to the prohibition, since an extension of the term 'party' to include all employees would bar access to a vast number of potential witnesses and permit the government agency to insulate such witnesses from interviews except through costly discovery procedures.[14]

Under such principles, the court in *Gilbert* found that an employee of the New York State Department of Transportation (the "DOT"), which was a defendant in an action asserting that icy road conditions resulting from DOT negligence caused an accident, who was interviewed only as to his knowledge of the road conditions, was not a party.[15] Conversely, in a matter involving a municipal legislature or land use board, a member of that board or legislative body would normally be a party, as he or she is part of a board vested with binding decision-making authority.

In addition to the question of who constitutes the "party," three issues which commonly arise in applying the No Contact Rule to communication with governmental entities are: (1) determining if (and when) a governmental body or employee is represented by counsel; (2) assessing whether the matter about which the communication is occurring is the same matter on which the government is being represented; and (3) deciding if the communication is otherwise authorized by law, such as by the First Amendment.

Ascertainment of when, in fact, a governmental entity is represented by counsel is more difficult than it would appear at first blush. A municipality, normally,

and the State, always, are represented by counsel. For example, the State's lawyer is the New York State Attorney General,[16] with a city being represented by its corporation counsel.[17] However, authority suggests that under DR 7-104(A)(1) legal representation of a governmental unit generically may not necessarily equate to representation of that governmental unit on a specific matter. For example, in *Schmidt v. State, supra*, the lawyer for the DOT contended that the claimant's attorney violated the No Contact Rule by interviewing certain DOT employees. Therein, the claimant, who had filed a notice of intention to file a claim, but had received no formal notification that any attorney was appearing on behalf of DOT, alleged that DOT had improperly maintained a traffic signal, causing an automobile accident. DOT asserted that the communication of the claimant's lawyer with DOT employees was impermissible because DOT was represented by the Attorney General. After noting that it was undisputed that the DOT employees were parties,[18] the decision framed the central issue to be determination of when the governmental party was, in fact, represented by a lawyer. *Schmidt* recognized that the State is always represented by the Attorney General, but went on to state that "if a governmental party were always considered to be represented by counsel for purposes of [DR 7-104(a)(1)], the free exchange of information between the public and the government would be greatly inhibited."[19] Ultimately, *Schmidt* held that the State was not represented by counsel in the matter.

As alluded to above, another issue regarding regulation of attorney communication with governmental parties arises where a single party is represented by an attorney on multiple related matters before a given agency; does the No Contact Rule apply to some or all of the matters? For example, in Opinion 652, the Committee reviewed an instance in which an administrative body was represented by counsel both with respect to enforcement proceedings against a party and that party's related application for a permit. The question raised was whether the party's attorney could contact agency officials in connection with proposed regulations that were directly related to the subject of the enforcement proceedings (including the amount of potential fines) and the permit application. The Committee determined that the agency's representation by an attorney in the enforcement and permitting matters did not constitute representation with respect to the related rulemaking. Therefore, it found that the party's attorney was entitled to communicate with the agency's in-house attorneys and technical specialists involved in the rulemaking process.

The final question is whether a lawyer's communication with a specific governmental entity is "authorized by law" under DR 7-104(A)(1) based on, among other things, the First Amendment. That inquiry is the crux of the Committee's Opinion 812.

Application of the No Contact Rule to a Planning Board—Opinion 812

Opinion 812 considered whether the in-house attorney of a real estate development company was allowed to communicate privately and informally with members of a municipal planning board that was reviewing the developer's pending application for approval of a shopping center, and, in particular, with those board members who were favorably disposed to the application. The facts addressed in Opinion 812 were as follows: The proposed development was undergoing site plan and subdivision review, as well as associated environmental review under the State Environmental Quality Review Act ("SEQRA"),[20] by a seven-member municipal planning board.[21] As the process progressed, it became clear that the majority of the board opposed the project.[22] Also evident from Opinion 812 was that the board as a whole was represented by outside counsel retained specifically in connection with review of the application.[23] Therefore, no question existed as to whether the planning board was represented by counsel. In fact, the planning board's attorney expressly objected to any *ex parte* communications with individual members of the planning board and instructed the attorney for the developer to restrict communications to written submissions addressed to the planning board secretary for distribution to the entire board.[24]

The applicant's attorney represented to the Committee that he was not seeking to provide the board members with legal advice or assistance.[25] Based on the applicant's representations, the Opinion recognized that the separate communications were:

> confined to the provision and receipt of factual information and discussion of state and local environmental and land use issues and policies and are intended to ensure[s] that supportive members of the planning board have the information they need to counter the opposition's efforts to derail the project and are able to share facts and strategies with the developer. The developer thus seeks to create an even playing field with [m]embers of the public who oppose the project [and who] communicate and strategize with like-minded members of the planning board, without going through the board's legal counsel.[26]

In responding to the inquiry of whether the No Contact Rule foreclosed the developer's attorney from continuing to speak with individual members of the board over the objections of the board's attorney, Opinion 812 addressed the threshold issue of whether the members of the planning board were parties. The Committee did not find this issue to be particularly difficult and noted that under the No Contact Rule, pursuant to the *Niesig* test, only government officials with authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose act or omission gave rise to the matter in controversy, are parties. The Committee stated, "Here, as a planning board is invested with the power to issue binding SEQRA, site plan and subdivision determinations with respect to the matter before it, the *Niesig* 'party' test is satisfied."[27]

Turning to the central issue before it, the Committee noted that in an earlier decision[28] it had opined that where a public body is involved, there is an exception to the No Contact Rule "based on the 'overriding public interest [which] compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them.'"[29] The Committee stated the view that "literal application of the 'no-contact' rule must be tempered by constitutional considerations where the First Amendment right to petition the government is implicated—is shared by most authorities."[30]

In reaching the conclusion that the developer's attorney was authorized to communicate with planning board members, Opinion 812 relied on, and to a large degree adopted the approach of, an American Bar Association Ethics Opinion—Opinion 97-408 (the "ABA Opinion")—which interpreted Model Rule 4.2,[31] the functional equivalent of DR 7-104(a)(1).[32] Opinion 812 recognized the inherent "'tension between a citizen's right of access and the government's right to be protected from uncounselled communications by an opposing party's lawyer'" as set forth in the ABA Opinion. Opinion 812 resolved the "inherent tension" by allowing unconsented contact, subject to specified limitations. Its conclusion reads as follows:

> Absent the application of state or local ordinances that prohibit or regulate the practice, and subject to the qualifications set forth in this opinion, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending SEQRA, site plan and subdivision determinations *provided*: (a) the proposed communications solely concern municipal development policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.[33]

Employing this approach, Opinion 812 advised that the proposed communications with the planning board members were protected by the First Amendment and not prohibited by DR 7-104(A)(2), but required the applicant to give reasonable advance notice of the communications to the board's counsel.[34] Notably, it did not appear that the Committee premised its ruling on the fact that the board members being contacted were favorable to the position advocated by the applicant's attorney,[35] but rather on the policy considerations favoring free access to governmental agencies.

Opinion 812 also included several potentially significant limitations. For example, it declined to rule on whether the type of communications being reviewed might violate any other local or state ordinance or ethics code, and stated that it was not addressing the propriety of *ex parte* communications with "an adjudicatory governmental body, such as a zoning board of appeals, which present different considerations."[36] It also recognized that the "precise parameters of the constitutional right to petition" were beyond its authority.[37] Finally, Opinion 812 cautioned that an attorney may not deliberately elicit information that is protected by attorney-client privilege or which constitutes attorney work product and, perhaps most importantly, that "the inquirer should cease contact with a planning board member if the member so requests."[38]

Observations Regarding Opinion 812

Opinion 812 provides needed guidance as to the application of the No Contact Rule to the land use practice, but certainly leaves a number of questions open. It elucidates that even if a planning board attorney (or, it is respectfully submitted, an attorney for a municipal legislative body) does not consent to communication with board members by an applicant's attorney, the latter is still free to engage in such contact so long as the municipal attorney is afforded advance notice of the communication. The advance notice gives the municipal attorney an opportunity to provide substantive advice to the client before any meeting occurs, or to counsel the board member not to communicate at all with an applicant's attorney. Of course, an applicant's attorney must refrain from engaging in discussions with a board member in the event the board member asks that the contact cease.

Although Opinion 812 ultimately eschews any attempt to define with precision the scope of communications for which the protections of the First Amendment outweigh the purposes of the No Contact Rule,

the subject matter of the unconsented communications with planning board members that was found to be appropriate in Opinion 812 is quite broad. As noted above, the communications included the exchange of factual information, discussion of environmental and land use issues and policies, and even strategy with friendly board members. Such communications provided friendly board members with information needed to assist in their debate with members who opposed the project. It is evident, therefore, that Opinion 812 recognized that a wide range of communications between an applicant's attorney and planning board members is acceptable without consent of the board's attorney.

Dealing, as it does, with informal contacts with individual board members, Opinion 812 would seem to have few, if any, implications for a letter formally written to a land use board as a whole, regarding a matter being reviewed. It is submitted that such a form of communication is at the heart of the type of speech protected by the First Amendment and does not pose the same risks of imperiling the purposes of DR 7-104(A)(1) as would behind-the-scenes discussions with individual board members, and, therefore, should not be subject to a requirement of consent by the municipal board's attorney or, in the author's view, even to the advance notice requirement.[39] It should also be recognized that provisions of the Town Law, Village Law, General City Law and SEQRA, among others, mandate opportunities for public comment with respect to various land use approvals.[40] Consequently, it is hard to imagine that communications made formally to the entire land use board by an applicant's attorney in the context of the statutorily provided opportunities for comment would not, for the purposes of DR 7-104(A)(1), be authorized by law.[41] Of course the Freedom of Information Law, Article 6 of the Public Officers Law, also authorizes certain types of direct communications with governmental entities such as municipalities and their agencies, boards and commissions.[42]

Whether the guidance provided by Opinion 812 applies in the same fashion to contact with a municipal legislature considering zoning or land use regulations is not answered by Opinion 812. Nonetheless, attorney comment on proposed legislation would have to be considered core political speech under the First Amendment[43] and/or authorized by the state enabling legislation provided for the enactment of zoning, so it would be difficult to imagine that the No Contact Rule would restrict formal communication to the legislative body as a whole. It is also doubtful that a principled basis exists to make guidelines under the No Contact Rule applicable to informal communication by an attorney to individual local legislators regarding pending land use measures, which would be more restrictive than those set forth in Opinion 812 for communications with planning board members.

At least one aspect of Opinion 812 is misleading. It states that if communications are "directed at governmental officials who do not have authority to take or recommend action" or "are communications that are intended to secure factual information relevant to a claim (for example, mere witness to government misconduct)," they are fully subject to the No Contact Rule as they do not implicate the First Amendment.[44] Such a statement, however, begs the question whether such communication is proper. As discussed above, those officials who lack authority to bind a party (or whose actions cannot be imputed to the party for the purpose of liability) are not normally considered to be parties at all under the No Contact Rule.[45] Consequently, such officials are non-parties who are "fair game" for *ex parte* contact. The question of whether the communication with such officials is justified by the constitutional guarantee of free speech should be irrelevant.

Presumably technical staff members who assist planning and zoning boards—such as the municipal engineer, the municipal planner and the municipal environmental consultant—would not usually be parties for the purposes of DR 7-104(A)(1). Such municipal employees normally do not play a policy-making role or have the independent ability to approve development or bind the municipality with respect thereto. If such officials act in a typical capacity, an attorney representing an applicant should be able to contact them directly without notifying the municipality's counsel. Such a stance is consistent with the administrative imperatives which often require the attorney representing an applicant to discuss the procedural and technical requirements for the various application materials and environmental submissions with municipal staff on an ongoing and prompt basis.

Endnotes

1. For example, Rule 4.2 of the American Bar Association's Model Rules of Professional Responsibility states the following:

    > 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.

2. 22 N.Y.C.R.R. § 1200.35.
3. Arguably, it would also "turn the governmental process into an administrative nightmare" if the No Contact Rule were rigorously applied to interdict communications between lawyers and public officials. *See* Goldstein, *Contacting an Adversary's Employees: A Breach of Legal Ethics*, 65 N.Y.S.B.J. 22, 26 (March/April 1993).
4. A number of jurisdictions utilize precisely such an approach and make the No Contact Rule wholly inapplicable to attorney communications with governmental entities, apparently to protect First Amendment rights. For example, California's

rules of professional conduct expressly state that the No Contact Rule "shall not prohibit . . . [c]ommunications with a public officer, board, committee, or body . . ." California Rules of Professional Conduct, Rule 2-100(C)(1). The standard in the District of Columbia states, "This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's clients . . ." District of Columbia Rules of Professional Conduct § 4.2(d). (Under the District's rules, however, the lawyer is required to disclose his or her identity, identify his or her client, and tell the witness that his or her interests may be adverse to those of the governmental agency by which the witness is employed); *See* Utah State Bar Ethics Opinion Committee, Opinion No. 115 (5/20/93) (finding that "because the Utah and United States Constitutions guarantee all private citizens access to government, all communications, whether oral or in writing, with employees or officials of a government agency under any circumstances are permitted" and that "a lawyer representing a government office or department may not prevent his non-government counterpart from contacting any employee of the government office or department outside the presence of the government attorney . . .").

5. *See, e.g.*, New York City Bar Ethics Opinion 1991-4 (8/21/91).
6. *Niesig v. Team I*, 76 N.Y.2d 363, 370, 559 N.Y.S.2d 493, 496 (1990) (citations omitted).
7. EC 7-18. Although this article is primarily concerned with contact with municipal officials in the land use area, it should be noted that in the different context of litigation against a governmental entity, violation of DR 7-104(A)(1) leads to disciplinary action rather than to suppression of evidence obtained in violation thereof. Absent some constitutional, statutory or decisional authority mandating suppression, evidence obtained through unethical means is still admissible and applies to information obtained in contravention of the No Contact Rule. *Heimanson v. Farkas*, 292 A.D.2d 421, 422, 738 N.Y.S.2d 894, 894 (2d Dep't 2002); *Stagg v. New York City Health and Hospitals Corporation*, 162 A.D.2d 595, 596, 556 N.Y.S.2d 779, 780 (2d Dep't 1990); *Tabbi v. Town of Tonawanda*, 111 Misc. 2d 641, 444 N.Y.S.2d 560 (Sup. Ct., Erie Co. 1981).
8. Former employees of an entity which is involved in a matter are not parties and, therefore, lawyers are not foreclosed from contacting them directly, but, nonetheless, the attorney should warn them not to reveal any privileged information. *See Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506, 511-512, 836 N.Y.S.2d 527, 529-530 (2007) (noting *Niesig* acknowledged that *ex parte* interviews with former employees are neither unethical nor illegal).
9. *Niesig*, 76 N.Y.2d at 374, 559 N.Y.S.2d at 498.
10. *Id. See Schmidt v. State*, 279 A.D.2d 62, 66, 722 N.Y.S.2d 623, 626 (4th Dep't 2000), *lv. denied*, 731 N.Y.S.2d 623 (4th Dep't 2001) (quoting *Niesig* as stating "'[b]y preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(a)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.'"). Moreover, at least in the litigation context, the definition of "party" in *Niesig* is intended to strike "a balance between protecting unrepresented parties from making imprudent disclosures, and allowing opposing counsel the opportunity to unearth relevant facts through informal discovery devices, like *ex parte* interviews, that have the potential to streamline discovery and foster prompt resolution of claims." *Muriel Siebert & Co., Inc.*, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530.
11. *Niesig*, 76 N.Y.2d at 375, 559 N.Y.S.2d at 498-499.
12. *See New York State Bar Association, Committee on Professional Ethics Opinion 652* (8/27/93) ("Opinion 652"); *Gilbert v. State*, 174 Misc. 2d 142, 662 N.Y.S.2d 989 (Ct. Cl. 1997).
13. *See Neisig*, 76 N.Y. 2d 374-375, 559 N.Y.S. 2d 498-499.
14. 7 N.Y. Jur. 2d, *Attorneys at Law*, § 381.
15. *Gilbert v. State, supra* note 12.
16. Executive Law § 63.
17. Second Class Cities Law §§ 200-201.
18. *Schmidt*, 279 A.D. 2d at 65, 722 N.Y.S.2d at 625.
19. *Id.*
20. "SEQRA" collectively refers to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617.
21. Opinion 812 at 1.
22. *Id.*
23. Opinion 812 at 2.
24. *Id.*
25. *Id.*
26. *Id.* [bracketed material in original].
27. Opinion 812 at 3.
28. N.Y. State 404 (1975).
29. Opinion 812 at 3.
30. *Id.*
31. The commentary to Rule 4.2 of the American Bar Association's Model Rules for Professional Responsibility (the ABA's version of the No Contact Rule), states that "communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government."
32. Opinion 812 at 4.
33. Opinion 812 at 5 (italics in original).
34. Opinion 812 at 4-5.
35. Just over two decades prior to the issuance of Opinion 812, in New York State Bar Ethics Opinion 404 (8/13/75) ("Opinion 404"), the Committee reached a similar outcome regarding the right of a petitioner's lawyer to contact members of a board of education who voted with the minority regarding the board's action. In Opinion 404, the Committee legitimized the communications, but appeared to have placed great significance on the fact that those members of the board of education who the attorney was contacting were actually favorable to the position the attorney was taking on behalf of his client. The Committee framed the issue as "whether an individual member of a public body must be considered an adverse party in regard to a decision he opposed." The reasoning for its conclusion was set forth in the following passage:

    > The overriding public interest compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. Minority members of a public body should not for the purposes of DR 7-104(A)(1) be considered adverse parties to their constituents whom they were selected to represent.

    The author submits that the question of whether the municipal official who an attorney wishes to contact is favorable or opposed to the position being advocated should be irrelevant to the proper application of DR 7-104(A)(1).
36. Opinion 812 at 5. The author submits that the possible distinction of zoning boards of appeal from other land use boards posited by Opinion 812 is without sound basis because such boards, like planning boards, have been held to be quasi-administrative/quasi-legislative, rather than quasi-judicial. *See Pietrzak & Pfau Associates v. Zoning Board of Appeals of Town of Walkill*, 34 A.D.3d 818, 827 N.Y.S.2d 84 (2d Dep't 2006) ("'municipal land use agencies like the Zoning Board are

quasi-legislative, quasi-administrative bodies . . . '(citation omitted)"); *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770, 809 N.Y.S.2d 98, 103-104 (2d Dep't 2005), *lv. denied*, 6 N.Y.3d 890, 817 N.Y.S.2d 624 (2006) and 7 N.Y.3d 708, 822 N.Y.S.2d 482 (2006) (recognizing that municipal land use agencies like the Zoning Board are "quasi-legislative, quasi-administrative" bodies and holding that judicial review of a determination by a zoning board of appeals is not subject to the "substantial evidence" test, which is only applicable to actions taken by a quasi-judicial body, but rather, governed by the "arbitrary and capricious" standard, which applies to other administrative proceedings). They are not "adjudicatory" in the true sense of that term.

37. Opinion 812 at 5.
38. *Id.*
39. Nothing in this article is intended to suggest that it is a wise course of action for an applicant's attorney to attempt to excise, selectively or wholly, the municipal attorney from the review process. A constructive relationship between the applicant's attorney and the board's attorney, in which the latter is kept abreast of the applicant's submissions and the progress of the application, normally benefits the applicant and hopefully facilitates a process that progresses in a rational fashion. It is most strongly suggested that the attorney for a land use board should be provided copies of all correspondence submitted by the applicant's attorney when they are submitted to that board.
40. *See, e.g.*, Town Law §§ 267-a, 274-a, 274-b, 276; Village Law §§ 7-712-a, 7-725-a, 7-725-b, 7-728; 6 N.Y.C.R.R. 617.9(a).
41. It should be noted that the ABA Opinion expressly finds that when a lawyer representing a private party intends to communicate with a governmental official with authority to take or recommend action in a matter in controversy, he or she should provide the government's attorney with advance notice of the communication to allow the latter to advise the official regarding whether to communicate with the lawyer—a finding that the ABA Opinion indicated applies with respect to oral and written communications to governmental officials. The example the ABA Opinion uses, however, involves a lawyer attempting to communicate with a committee of a city counsel to discuss potential settlement of litigation. While the advance notice requirement makes sense in such a context, the author of this article respectfully submits that it should not be applied where a lawyer is simply making comments on behalf of his or her client, as a member of the public, with respect to proposed legislation or regulations.
42. *See, e.g., Fusco v. City of Albany*, 134 Misc. 2d 98, 101-102, 509 N.Y.S.2d 763, 766 (Sup. Ct., Albany Co. 1986).
43. The question of the restrictions imposed by potentially applicable lobbying rules on communications by a lawyer with local legislators is beyond the scope of this article.
44. Opinion 812 at 5.
45. *See* Opinion 652, *supra; Gilbert v. State, supra* note 12; 2 N.Y. Jur.2d, *Attorneys at Law* §381, *supra* note 14.

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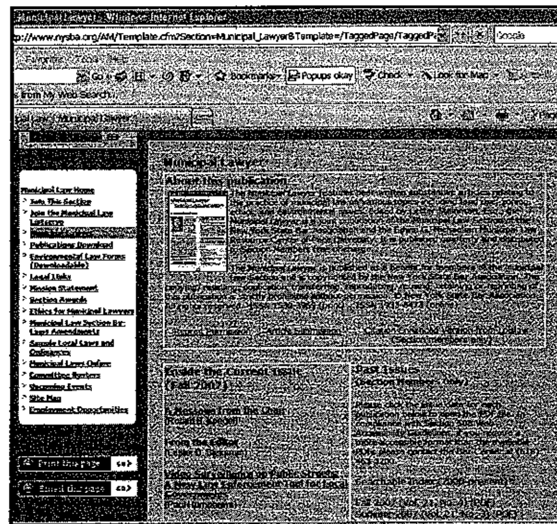

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